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No.

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IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS. INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Petitioners
The Capitol
Albany, NY 12224
(518) 474-8101

JERRY BOONE
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

LEW A. MILLENBACH
Assistant Attorney General
Of Counsel

Dated: August 31, 1993

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
(3336—LC10-404—1993)

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Question Presented

Whether, in order to prevent the avoidance of tax by non-Indian purchasers of cigarettes from Indian retailers, the State of New York may require the retailers' cigarette suppliers to comply with regulations limiting the quantity of tax exempt cigarettes which can be purchased for resale at reservation outlets to an amount no greater than the maximum legitimate Indian consumption of the reservation, and imposing upon the suppliers minimal burdens relating to record keeping and reporting.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS, INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioners, the Department of Taxation and Finance of the State of New York and James W. Wetzler, Commissioner of Taxation and Finance of the State of New York, respectfully pray that a writ of certiorari issue to review the order of the New York State Court of Appeals entered in these actions on June 10, 1993. The order of the Court of Appeals is set forth as Appendix "A".

The order of the Court of Appeals reversed an order of the Appellate Division, Third Department, which was rendered pursuant to an order of this Court, entered January 21, 1992 (Docket No. 91-907), in which this Court granted a petition for a writ of certiorari filed by petitioners, vacated the Appellate Division's prior order and remanded the case to the Appellate Division for further consideration in light of *Oklahoma Tax Comm'n v Citizen Band Potawatomi Indian Tribe of Oklahoma* ("*Potawatomi*"), 498 US 505 (1991).

Opinions Below

The opinion of the Court of Appeals was rendered on June 10, 1993. The opinion is not yet reported. It is set forth as Appendix "B".

The opinion of the Appellate Division was rendered on July 9, 1992. The opinion is reported at 181 AD2d 210 (3d Dept 1992). It is set forth as Appendix "C".

The order of this Court granting petitioners' petition for a writ of certiorari and vacating the judgment of the Appellate Division, Third Department and remanding the case to the Appellate Division for further consideration in light of *Potawatomi* was entered on January 21, 1992. The order is reported at ___ US ___, 117 L Ed 2d 99, 112 S Ct 926 (1992). It is set forth as Appendix "D".

The original opinion of the Appellate Division, Third Department was rendered on December 6, 1990. The opinion is reported at 164 AD2d 300 (3d Dept 1990). It is set forth as Appendix "E".[1]

The opinion of the Supreme Court, Albany County, was rendered on June 5, 1989. The opinion is not reported. It is set forth as Appendix "G".[2]

Jurisdiction

The order of the Court of Appeals was entered on June 10, 1993. This petition for certiorari is filed within 90 days of June 10, 1993. The Court's jurisdiction to review the case rests upon 28 USC § 1257(a).

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[1]The original order of the Appellate Division is set forth as Appendix "F".

[2]The order and judgment of the Supreme Court, Albany County, is set forth as Appendix "H".

Statutory and Regulatory Provisions Involved

25 USC §§ 261-264; New York Tax Law §§ 471, 474, 481, 1814, 1846, 1847; 20 NYCRR §§ 335.6 and 335.7. These provisions are set forth in pertinent part as Appendix "I".[3]

Statement of the Case

A. Facts and Procedural Background

These cases involve questions of whether and to what extent federal law permits States to impose incidental burdens on Indian traders in order to prevent the avoidance of tax by non-Indian purchasers of retail goods, here cigarettes, from retailers on Indian reservations. Respondent Milhelm Attea & Bros., Inc. ("Milhelm") is a licensed New York State cigarette tax agent and wholesale dealer of cigarettes (New York Tax Law §§ 470[6] & [9], 472, 480), a portion of whose business involves the wholesale sale of cigarettes to retailers on various Indian reservations in New York. Respondent Elias H. Attea, Jr. ("Elias") is also in the business of selling cigarettes at wholesale on Indian reservations but is not licensed as either a cigarette tax agent or wholesale dealer of cigarettes.

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[3]Effective December 19, 1990, 20 NYCRR 335.6 and 335.7, the regulations at issue, were renumbered 20 NYCRR 336.6 and 336.7 without any substantive change. In order to maintain consistency with the opinions rendered by the New York State courts, we will continue to employ the old numbering.

In December, 1988 Milhelm and Elias brought independent actions in the Supreme Court, Albany County seeking declaratory and permanent injunctive relief to enjoin the application to their businesses of certain regulations adopted by the Commissioner of Taxation and Finance in August, 1988. The regulations were designed to prevent the sale of untaxed cigarettes to non-Indians at retail outlets on Indian reservations located in New York State. It was the respondents' contention that they were federal Indian traders and that insofar as the new regulations imposed burdens upon their dealings with their Indian customers, the regulations were preempted by the Indian trader statutes. 25 USC § 261 *et seq.*

The challenged regulations are substantially similar to regulations adopted by the Commissioner of Taxation and Finance effective November 30, 1988 dealing with the sale and distribution of motor fuel in New York. In *State Tax Commn. of the State of New York v Herzog Bros. Trucking, Inc.*, 487 US 1212 (1988), this Court granted a petition for certiorari filed on behalf of the State Tax Commission and vacated and remanded to the New York Court of Appeals for further consideration, in light of the then proposed motor fuel regulations, a judgment of the Court of Appeals holding that the State's "pass on and collect" motor fuel tax scheme could not be applied to motor fuel distributors selling motor fuel at wholesale to Indian retailers because the Indian trader statutes, 25 USC § 261 *et seq.*, preempted the field of regulating trade with Indians. *Herzog Bros. Trucking, Inc. v State Tax Commn.*, 69 NY2d 536 (1987).

Following remand, the Court of Appeals adhered to its original decision. 72 NY2d 720 (1988). Because the regulations only applied to sales of motor fuel made after January 1, 1989, and it appeared that Herzog Brothers, Inc. would not continue to sell to Indians after that date, the court declined to consider the validity of the new regulations. The court correctly observed in this regard that to do so under the circumstances "would constitute an advisory opinion involving hypothetical future transactions of unknown parties". 72 NY2d at 725. The court did opine that "[i]n the absence of a reversal by the Supreme Court, we assume that our interpretation of those decisions [referring to *Central Machinery Co. v Arizona Tax Commn.*, 448 US 160 (1980), and *Warren Trading Post Co. v Arizona Tax Commn.*, 380 US 685 (1965)] and our application of them to the facts before us represents the present state of the law on the subject". 72 NY2d at 724-725.

On January 18, 1989 the Supreme Court, Albany County, granted a preliminary injunction as requested by the respondents. Petitioners served their answers on January 20, 1989, and each side thereafter moved for summary judgment. The Supreme Court (Cheeseman, J.) rendered its decision on June 5, 1989. Based on the authority of the Court of Appeals' decision in *Herzog Brothers Trucking, supra*, which the court found indistinguishable, the Supreme Court granted respondents' motions for summary judgment declaring the challenged regulations invalid with respect to their sales of cigarettes to Indians on Indian reservations in New York and denied in all respects petitioners' motion to dismiss or, in the

alternative, for summary judgment (A33-A43).[4] The court's order and judgment was entered on August 22, 1989.

Petitioners appealed, and by a unanimous decision dated December 6, 1990, the Appellate Division, Third Department affirmed (A19-A24). In the opinion of the Appellate Division the issues presented were similar to those considered by the New York Court of Appeals in *Herzog Brothers Trucking, supra*, upon which the Appellate Division deemed itself to be bound. The Court said in relevant part, "[a]ccordingly, the tax scheme under review here fails because it imposes some burden, although only minimal, on the Indian trader contrary to the Court of Appeals' interpretation of the applicable Supreme Court decisions" (A24).

Petitioners thereafter filed an appeal as of right to the New York Court of Appeals pursuant to New York CPLR 5601(b)(l). By an order dated May 9, 1991 the Court of Appeals dismissed petitioners' appeal *sua sponte*, upon the ground that no substantial constitutional question was directly involved. Petitioners' subsequent motion for leave to appeal to the Court of Appeals was denied without opinion by an order of the Court of Appeals entered on September 12, 1991.

On November 25, 1991, the petitioners filed a petition for a writ of certiorari. The basis upon which the writ was sought was that this Court's decision in *Potawatomi*, which was

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[4]Numbers in parentheses preceded by the letter "A" refer to pages of the Appendix.

decided by the Court some two months after the Appellate Division rendered its original decision, made clear that this Court intended its decisions in *Moe v Confederated Salish and Kootenai Tribes*, 425 US 463 (1976), and *Washington v Confederated Tribes of Colville Reservation*, 447 US 134 (1980), to be read as affirming the right of the States, notwithstanding the Indian trader laws, to exercise some regulatory authority over Indian traders as an aid to the enforcement of their tax laws. On January 21, 1992 this Court granted petitioners' petition for a writ of certiorari, vacated the Appellate Division's prior order and remanded the case to the Appellate Division for further consideration in light of *Potawatomi* (A17-A18).

On July 9, 1992 the Appellate Division rendered its decision on remand (A13-A16). The Appellate Division observed that while the precise issue of federal preemption presented in this case was not directly before this Court in *Potawatomi*, this Court nevertheless had explicitly addressed the issue in response to a concern by the State of Oklahoma that because of the Indian Tribe's sovereign immunity it would be unable to enforce its tax scheme to collect sales tax from non-Indians doing business at tribal stores. The Appellate Division quoted from this Court's opinion in *Potawatomi* the Court's observation that "under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation * * * or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores". *Oklahoma Tax Comm'n v Citizen Band Potawatomi Indian Tribe of Okla.*, 498 US at 514. From this the court concluded that this Court was of the view that not all

burdens placed on Indian traders by States attempting to enforce tax schemes aimed at taxing sales by Indian retailers to non-Indians made on reservations was impermissible (A15). The court then said (A15-A16):

> "The Supreme Court's observations call into question the continued validity of the legal analysis underpinning the Court of Appeals' decision in *Herzog Bros. Trucking v State Tax Commn.* (69 NY2d 536, *vacated* 487 US 1212) and again considered by that court upon remand from the Supreme Court and which opinion was the legal underpinning for our holding in this matter (164 AD2d 300, *supra*).
>
> "We now hold that minimal burdens such as are prescribed by the tax scheme promulgated pursuant to 20 NYCRR 335.5 upon Indian traders in collecting sales taxes on sales by Indian retailers to non-Indian purchasers made on Indian reservations are not barred by Federal preemption of the field of regulating trade with Indians (*see*, 25 USC 261 *et seq*)."

The Appellate Division accordingly reversed the order and judgment of the Supreme Court, denied respondents' motions for summary judgment, granted petitioners' cross-motions for summary judgment and declared that the challenged regulations had not been shown to be unconstitutional. Respondents thereafter appealed.

By a decision rendered on June 10, 1993, the Court of Appeals reversed (A3-A12). The Court of Appeals held that the challenged regulations imposed obligations upon wholesale Indian traders and were therefore preempted by federal law (A7). The Court of Appeals read this Court's direction in *Potawatomi* that "States may of course collect the sales tax from cigarette wholesalers * * * by assessing wholesalers who supplied unstamped cigarettes to the tribal stores", 498 US at 514, as "indicat[ing] that the method might somehow be used to retroactively collect taxes unpaid on past sales" (A11). However, the court declined to read the quoted language as establishing the right of States to impose even minimal regulatory burdens on wholesalers supplying Indian retailers as an aid to enforcement of valid State tax laws (A11). The court said in this regard (A10):

> "* * * we do not interpret the Supreme Court's statement [in *Potawatomi*] as altering the established rule stated in *Warren Trading Post Co. v Arizona Tax Commn* (*supra*, 380 US at 690) that Congress has taken the matter of regulating Indian traders so fully in hand that no room remains for state laws imposing additional burdens upon them. The [quoted] language cites none of the relevant decisions in this area and, as interpreted by [petitioners], is contrary to the present state of the law on the subject."

As an alternative holding, the Court of Appeals ruled that to the extent this Court's decisions in *Moe*, *Colville* and *Potawatomi* "may be read as validating the imposition of minimal burdens

on Indian retailers and Indian traders" (A11), the tax regulations at issue were barred by federal preemption because in the court's view they imposed "significant" burdens on the wholesalers (A11).

B. The Tax Scheme

Section 471(1) of the New York Tax Law imposes a tax on all cigarettes possessed in this State except where the cigarettes "are sold under such circumstances that this state is without power to impose such tax". The law presumes that all cigarettes within the State are subject to tax until the contrary is established and places upon the possessor the burden of proving nontaxability. The ultimate incidence and liability for the tax is upon the consumer. Tax Law § 471(2).

Payment of the cigarette tax in New York is effected through the use of stamps which are purchased and affixed to packages of unstamped cigarettes by registered stamping agents licensed by the Department of Taxation and Finance. The cigarettes are brought into the State untaxed, and the agents, by purchasing and affixing the stamps to the unstamped packages, make payment of the tax in advance of the products' first sale in New York. Thereafter, the tax is added and collected as a part of the selling price of the cigarettes by each of the entities effecting subsequent sales until it is ultimately added to the retail price and is borne by the consumer. The law provides civil and criminal penalties for the unlawful possession of untaxed cigarettes in the State, Tax Law §§ 481, 1814, 1846, 1847, and details the kinds of records which must be maintained by persons who "possess or transport any unstamped cigarettes upon the public highways, roads or streets of the state". Tax Law § 474.

The regulations which implement the cigarette tax, and which are challenged in these actions, were adopted by the Commissioner of Taxation and Finance on August 29, 1988 and became fully effective on January 1, 1989. The regulations are designed to prevent the loss of an estimated $65 million in cigarette taxes annually by preventing the sale of unstamped cigarettes to non-Indians by retailers at reservation outlets.[5] Broadly, the regulations create a mechanism whereby retail dealers of cigarettes on qualified Indian reservations are permitted to purchase a sufficient quantity of untaxed cigarettes to satisfy the needs of their Indian customers, while at the same time ensuring that if they wish to make sales of cigarettes to non-Indians they have available taxed and stamped product for that purpose. Only reservation retailers who have registered with the Department of Taxation and Finance are permitted to purchase or sell at retail unstamped cigarettes and then only in an amount which is no greater than the maximum legitimate Indian consumption of the reservation on which they are located. 20 NYCRR §§ 335.6 and 335.7. No limit is imposed

[5]This estimate, which is substantially higher than the estimate used in prior phases of this litigation, is the result of a study undertaken in early 1993 by the Department of Taxation and Finance's Office of Tax Policy Analysis. In conducting the study the Office of Tax Policy Analysis contacted and obtained information from cigarette agents and suppliers doing business both in and out of New York State. The estimate is based upon the figures supplied. However, because not all of the suppliers contacted cooperated in the study, the actual amount of tax revenue lost to the State is almost certainly higher. It is also estimated that the State loses approximately $35 million in taxes anually because of reservation sales of motor fuel to non-Indians.

upon the amount of stamped product which a retail dealer may purchase and sell.

The only portions of the regulations which impose any burdens upon the retailers' cigarette suppliers are 20 NYCRR §§ 335.6(f) and (g) and 335.7(b), (c) and (d).[6] Section 335.6(f) and (g) requires that suppliers making tax free sales of cigarettes to wholesale or retail dealers located on Indian reservations request a copy of the dealers' tax exemption certificate and keep the copy as a means of substantiating the fact that the sale was a valid tax-free transaction. The regulation also requires that suppliers keep accurate records and maintain written evidence of their sales. Section 335.7(b), (c) and (d) provides that prior to each sale and delivery of cigarettes to a qualified Indian reservation the supplier must obtain approval from either the Indian nation or tribe or from the Department of Taxation and Finance regarding the quantity of product which may be delivered and sold without prepayment and collection of the tax.

As described in Notice N-88-53, which was sent by the Department of Taxation and Finance to all licensed cigarette agents in this State, as well as to all registered motor fuel and

[6]Section 335.6(c) does not now have any impact upon cigarette suppliers but could if the Commissioner of Taxation and Finance were to authorize the use of special stamps to identify packages of cigarettes intended for nontaxable sale to qualified Indians. If the use of such stamps is authorized, suppliers who are also cigarette tax agents would bear the minimal burden of affixing the special stamps to those packages of cigarettes intended for sale to qualified Indians.

diesel fuel distributors, the preapproval requirements of 20 NYCRR § 335.7(b), (c) and (d) are intended to be satisfied by means of a coupon system whereby each month registered dealers will be sent "Tax Exemption Coupons" by the Department of Taxation and Finance entitling them to receive a predetermined quantity of tax free product. At the time of delivery, the dealer is to complete the tax exemption coupon and submit two copies to the supplier. The supplier keeps one of the copies and within five days forwards the other one to the Department of Taxation and Finance. The amount of tax free product delivered may not exceed the preprinted amount authorized by the coupon. Thus, the focus and principal burden of the regulatory scheme lies with and falls upon the Indian nation or tribe and the reservation retailer. The only burden imposed upon the supplier is a minimal one relating to recordkeeping and reporting.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is in direct conflict with the decisions of this Court affirming the rights of States to impose minimal burdens on Indian traders in order to prevent the avoidance of tax by non-Indian purchasers of goods from Indian retailers and raises significant issues concerning the preemptive effect of the Indian trader statutes.

The decision of the Court of Appeals is in direct conflict with *Moe v Confederated Salish and Kootenai Tribes*, 425 US 463 (1976), *Washington v Confederated Tribes of Colville Reservation*, 447 US 134 (1980), and *Oklahoma Tax Comm'n. v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US

505 (1991), the case which this Court required the Appellate Division to consider on remand. We had believed that in those cases this Court made plain that States are free to impose minimal burdens on Indian traders in order to prevent the avoidance of tax by non-Indian purchasers of goods from Indian retailers. Nevertheless, the Court of Appeals, citing to its own decision in *Herzog Brothers Trucking*, where the court had held that the preemptive effect of the Indian trader statutes, 25 USC § 261 *et seq.*, was such as to preclude the State from imposing *any* burden on Indian traders, no matter how minimal, ruled that the challenged tax scheme was invalid because it imposed obligations on Indian traders. Because of this direct conflict and because the issue of whether States may employ Indian traders as an aid to monitoring and enforcing their tax laws is of great importance to those States in which Indian reservations are located, certiorari should be granted to correct the Court of Appeals' erroneous ruling.

In *Moe*, this Court upheld the right of the State of Montana to require Indian tribal sellers of cigarettes to collect a State sales tax imposed upon non-Indian purchasers of cigarettes. The tax scheme, which in this respect is similar to that of New York, required the seller to pay the tax to the wholesaler and then add it to the purchase price of the cigarettes for payment by the ultimate consumer. *See, Confederated Salish and Kootenai Tribes v Moe*, 392 F Supp 1297, 1308 (Dist of Montana 1975).

In approving the Montana law, this Court emphasized the fact that the cigarette tax had been validly imposed and observed that without the expedient of having the retailer collect the tax from the non-Indian purchasers "wholesale violations of the law by the latter class will go virtually unchecked". 425 US at 483. The Court distinguished *Warren Trading Post Co. v Arizona Tax Commission,* 380 US 685 (1965), which the court below cited as controlling, on the ground that the tax in that case, a gross income tax imposed on the on-reservation sales by a trader to reservation Indians, had been imposed directly on the seller and could, therefore, have put additional financial burdens on the trader or the Indians with whom it dealt. 380 US at 691. This, the Court held, "would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations". *Id.* In contrast, the collection requirement of the Montana law was characterized by the Court as "a minimal burden designed to avoid a likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax". 425 US at 483. The quoted language, from *Warren Trading Post Co.,* was held not to apply. 425 US at 482.

Although *Moe* did not deal directly with the question of whether the "minimal burden" approved with respect to Indian retailers could similarly be imposed upon the Indians' distributors, one step further back in the chain of distribution, the conclusion that it can becomes manifest when *Moe* is read in conjunction with *Colville,* which this Court decided four years later.

In *Colville,* this Court upheld the right of the State of Washington to impose minimal regulatory burdens on the operators of tribal smokeshops in order to prevent the avoidance of tax by non-Indian purchasers of cigarettes at the smokeshops. Quite significantly, although the operators of the smokeshops were federally licensed Indian traders, *see, Confederated Tribes of Colville v State of Washington,* 446 F Supp 1339, 1347 (ED Wash 1978), and thus subject to the Indian trader laws, this Court nevertheless upheld the right of the State of Washington to compel the operators to comply with the State's cigarette tax laws, which required them to purchase and affix tax stamps to packages of cigarettes intended for sale to non-Indians, and also required them to keep detailed records of their taxable and nontaxable sales. In ruling as it did, this Court made clear that federal Indian law, including the Indian trader statutes, did not preempt the Washington State tax scheme. The Court said, 447 US at 155:

> "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."

Of perhaps even greater significance is the further holding of the Court that the State of Washington had the power to seize shipments of unstamped cigarettes traveling to the reservation from out-of-state wholesalers even though the sales by the wholesalers to the tribal businesses were concededly exempt from State taxation and no State tax was due while the cigarettes were in transit. 447 US at 161-162.

This holding is in sharp contrast to the conclusion of the Court of Appeals, both here and in *Herzog Brothers Trucking*, that the Indian trader laws in and of themselves place every transaction between an Indian tribe and its supplier beyond the regulatory authority of the States.

Any doubts which may have continued to exist following *Colville* regarding the viability of State tax schemes which employ an Indians' supplier as an aid to enforcement should have been laid to rest when, in February, 1991, this Court decided *Potawatomi*. In that case, the Citizen Band of Potawatomi Indian Tribe (hereinafter "Tribe" or "Potawatomis") filed suit in the United States District Court for the Western District of Oklahoma to enjoin an assessment by the Oklahoma Tax Commission seeking $2.7 million for taxes on cigarette sales occurring between 1982 and 1986 at a convenience store owned and operated by the Tribe on land held in trust for it by the Federal Government. Among other questions before this Court was whether the Potawatomis' sovereign immunity prevented the Tribe from being liable for the collection of State taxes on the sale of cigarettes to nonmembers of the Tribe.

Citing to *Colville* and *Moe*, this Court answered this question in the negative, observing that "[a]lthough the doctrine of tribal sovereign immunity applies to the Potawatomis, that doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes". 498 US at 512. Of signal importance to the issue raised here, however, is that in response to Oklahoma's complaint that the Tribe's sovereign immunity would prevent it from enforcing its right

to tribal assistance guaranteed by such cases as *Moe* and *Colville*, the Court stated that the State could, under its decision, secure collection of the taxes by pursuing the Indians' wholesalers. The Court said, 498 US at 514:

> "In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as *Moe* and *Colville* give them a right without any remedy. There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. See *Ex parte Young*, 209 U.S. 123 (1908). And under today's decision, *States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, Colville, supra*, [447 US] at 161-162, *or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, City Vending of Muskogee, Inc. v Oklahoma Tax Comm'n*, 898 F. 2d 122 (CAlO 1990). * * *". Emphasis added.

The Court of Appeals, based upon its earlier analysis in *Herzog Brothers Trucking*, read this passage narrowly. The court stated that while the remedies discussed "might somehow be used to retroactively collect taxes unpaid on past sales" (A11), *Potawatomi* did not permit the State to

exercise regulatory authority over Indian traders "prospectively" to aid in the enforcement of its tax laws (A10). But the distinction drawn by the Court of Appeals is fallacious. If the Indian trader laws represent a bar to the exercise by the States of regulatory authority over Indian traders in their dealings with their Indian customers, it should not matter whether that authority is exercised prospectively or retrospectively. It seems clear to us that by instructing in *Potawatomi* that States have the right to collect sales tax from an Indian tribe's cigarette wholesaler by filing assessments against the wholesaler, this Court plainly was indicating that not all burdens placed upon Indian traders by States attempting to prevent the avoidance of tax by non-Indians doing business on Indian reservations are impermissible.

Central Machinery Co. v Arizona Tax Commission, 448 US 160 (1980), on which the respondents will undoubtedly rely, does not lead to a different result. In *Central Machinery Co.* this Court ruled that the State of Arizona could not impose a tax against the seller of goods when the sale was made to a tribal enterprise on an Indian reservation. The tax was a "transaction privilege tax" on the privilege of doing business in the State of Arizona. 448 US at 161-162. The amount of the tax was added as a separate item to the price of goods sold and was actually borne by the tribal enterprise. The Court ruled that its decision in *Warren Trading Post Co.* was controlling and held that the Indian trader statutes preempted the asserted State tax.

Although this Court couched its decision in *Central Machinery Co.* in terms of federal preemption, it is clear that the basis of the Court's ruling was not the mere existence and

breadth of the Indian trader statutes, but the underlying fact that the Arizona tax, which was characterized by the Court as being "precisely the same tax as was involved in *Warren Trading Post Co.*", 448 US at 164 n 3, actually had as its target the tribal enterprise and its supplier and could, therefore "'disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commission'". *Id.*, quoting from *Warren Trading Post Co.*, 380 US at 691. In contrast, just 17 days earlier in *Colville*,[7] this Court let stand the Washington State tax scheme which, while imposing regulatory burdens on federal Indian traders, did not target the traders or the tribe or its members for payment of the tax.

It follows that the formalistic and mechanical approach adopted by the Court of Appeals to the effect that State regulation of the respondents is impermissible simply because they are Indian traders, represents a fundamental misapplication of this Court's precedents which should be explicitly corrected. As was observed by this Court in a slightly different context in *Cotton Petroleum Corp. v New Mexico*, 490 US 163, 176 (1989), where this Court upheld a New Mexico severance tax on the same on-reservation production of oil and gas by non-Indian lessees as was subject to the tribes' own severance tax:

> "questions of pre-emption in [the area of Indian affairs] are not resolved by reference to

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[7] *Colville* was decided by this Court on June 10, 1980; *Central Machinery Co.* was decided on June 27, 1980.

> standards of pre-emption that have developed in other areas of the law, and are not controlled by 'mechanical or absolute conceptions of state or tribal sovereignty.' [Citations omitted.] Instead, we have applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case 'requires a particularized examination of the relevant state, federal and tribal interest.'" Citation omitted.

See also, Rice v Rehner, 463 US 713 (1983).

The Court of Appeals' alternative holding (A11-A12), that the challenged regulations are impermissible because they place "significant" burdens on wholesalers is similarly incorrect. As affects wholesalers, the challenged regulations are quite limited in their scope. They require no more than that cigarette distributors making tax free sales of cigarettes to wholesale or retail dealers located on Indian reservations obtain and keep a copy of the dealers' tax exemption certificate and keep accurate records and maintain written evidence of their sales (20 NYCRR § 335.6[f] and [g]), and obtain from the dealer and forward to the Department of Taxation and Finance the "Tax Exemption Coupons" through which it is contemplated that the limitations on tax exempt sales will be satisfied (*see*, pp 13-14, *supra*). In contrast, in *Colville*, this Court approved *in toto* Washington State's much more onerous recordkeeping requirements, which required smokeshop operators not only to record and retain for State inspection the number and dollar volume of taxable sales to nonmembers of the Tribe, but to record and retain "the names of all Indian purchasers, their tribal affiliations, the Indian reservations within which sales are

made and the dollar amount and dates of sales". 447 US at 159. Since the operators of the smokeshops in *Colville* failed to present any evidence on the question of whether the requirements of the law were overly burdensome, it was this Court's holding that the Tribes failed to meet their burden of showing that the challenged tax scheme was not reasonably necessary as a means of preventing fraudulent transactions. 447 US at 160. Here, too, there is no evidence on the question of whether the requirements of the New York law are not reasonably necessary to prevent the avoidance of tax by non-Indians doing business at reservation outlets. Thus, the Court of Appeals was clearly in error when it ruled that the challenged regulations exceeded the limits of permissible State action established by this Court's decisions in *Potawatomi, Moe* and *Colville*.

In addition, the Court of Appeals totally mischaracterized the nature of New York's regulatory scheme by asserting that "[t]he tax scheme requires wholesale distributors to prepay taxes on all cigarettes delivered on the reservations in excess of the predetermined maximum amount and, with respect to those cigarettes, *imposes a sales tax on Indian retailers*" (A11; emphasis added). As this Court's decisions make clear, such a precollection requirement with respect to cigarettes intended for sale to non-Indians does not amount to taxation of Indians, but represents the legitimate assertion by the State of its long recognized authority to employ Indian Tribes and retailers, and now their suppliers, "to assist in the collection [from non-Indians] of validly imposed state sales taxes". *Oklahoma Tax Comm'n v Citizen Band Potawatomi Indian Tribe of Oklahoma, supra*, 498 US at 512; *see also Washington v Confederated Tribes of Colville Reservation,*

supra, 447 US 134; *Moe v Confederated Salish and Kootenai Tribes, supra*, 425 US 463, 483 (Collection requirement of Montana law in *Moe*, held to be not a "tax", but "a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax"). If for no other reason, certiorari should be granted in these cases to correct the Court of Appeals' fundamental error in this respect.

These cases raise important issues that were wrongly decided by the Court of Appeals based upon its misreading and misapplication of relevant decisions of this Court. Fundamental tenets of federal Indian law and basic issues involving the right of States to prevent the avoidance of lawful taxes by non-Indian purchasers of goods from Indian retailers are at stake. Petitioners urge this Court to issue a writ of certiorari to review the decision of the New York Court of Appeals.

CONCLUSION

For the reasons stated, the Petition for a writ of Certiorari should be granted.

Dated: Albany, New York
August 31, 1993

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New York,
Attorney for Petitioners
Department of Taxation and Finance of
the State of New York and James W.
Wetzler, Commissioner of Taxation and
Finance of the State of New York

JERRY BOONE
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

LEW A. MILLENBACH
Assistant Attorney General

of Counsel

APPENDIX.

APPENDIX A— Order of Court of Appeals.

Remittitur

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Judith S. Kaye, Chief Judge, Presiding

3 No. 112

MILHELM ATTEA & BROTHERS INC., &c.,

Appellant,

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK *et al.*,

Respondents.

(and another related action.)

The appellant in the above entitled appeal appeared by Williams Stevens McCarville & Frizzell, P.C. and Zdarsky

Sawicki & Agostinelli, Esqs.; the respondents appeared by Hon. Robert Abrams, Attorney General of the State of New York; and *amici curiae* appeared by Block & Colucci, P.C., Bradley S. Waterman, Esq., Roland Fogel Koblenz & Carr and Hodgson Russ Andrews Woods & Goodyear, Esqs.

The Court, after due deliberation, orders and adjudges that the order is reversed, with costs, plaintiffs' motions for summary judgment granted, defendants' cross motions to dismiss the actions or for summary judgment denied, and judgment granted to plaintiffs in accordance with the opinion herein. Opinion by Judge Simons. Chief Judge Kaye and Judges Titone, Hancock, Bellacosa and Smith concur.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

STUART M. COHEN
Deputy Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 10, 1993.

APPENDIX B—Opinion of the Court of Appeals.

STATE OF NEW YORK

COURT OF APPEALS

3 No. 112

MILHELM ATTEA & BROTHERS INC., &C.,

Appellant,

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK *et al.*,

Respondents.

(and another related action.)

Joseph E. Zdarsky, for appellant Milhelm Attea & Bros.

Timothy M. O'Mara, for appellant Elias H. Attea, Jr.

Lew A. Millenbach, for respondents.

Joseph F. Crangle for Seneca Nation of Indians' Honor Indian Treaties Supporters Tribal Council Committee, *et al.*;

Seneca Nation of Indians; Empire State Petroleum Association, Inc.; Independent Petroleum Marketers of New York, Inc. *et al.*; and Saint Regis Mohawk Tribe *et al., amici curiae*.

SIMONS, J.:

This appeal requires the Court to assess the validity of tax regulations applicable to cigarette sales made on Indian reservations located in New York State. Although the challenged regulations are designed to prevent the avoidance of State taxes by non-Indians who purchase untaxed cigarettes from Indian retailers, and the incidence of the sales tax is intended to be borne by the ultimate non-Indian consumer, the tax provisions nevertheless regulate, to a significant degree, trade between wholesale distributors and their Indian purchasers, an area relevant decisions of the Supreme Court and this Court have found pre-empted by federal law. Accordingly, there must be a reversal.

I

Under New York Tax Law §471[1], a tax is imposed on all cigarettes purchased in New York. The tax is paid by the purchase of stamps which must be affixed to the cigarette packages as a precondition to the first taxable sale by the wholesaler or distributor. The tax is added and collected as a part of the selling price of the cigarettes along the distribution chain, until it is ultimately added to the retail price and is paid by the consumer.

Indians and Indian tribes are exempt from State taxation within their own territory and wholesale dealers may sell unstamped cigarettes to them. Consequently, many non-

Indians travel to Indian reservations to buy unstamped cigarettes and avoid the sales tax which should attach to all sales to non-Indians. In an effort to prevent this circumvention of the sales tax and prevent the sale of untaxed (unstamped) cigarettes to non-Indians at retail outlets on Indian reservations located in New York, the State Commissioner of Taxation and Finance adopted the regulations now challenged.

Under these regulations, only reservation retailers who have registered with the State Department of Taxation and Finance are permitted to purchase unstamped cigarettes, and then only in a predetermined amount calculated by the Department to approximate "probable demand of qualified Indian consumers in the trade territory" (*see*, 20 NYCRR §335.6 [d]; 20 NYCRR §335.7[c]).[1] Indian retailers may purchase an unlimited quantity of stamped cigarettes but, with respect to unstamped cigarettes, the wholesalers supplying them must 1) request a copy of the retailer's tax exempt certificate, 2) keep records of their sales, 3) obtain approval prior to each sale, from either the Indian nation or the Department of Taxation and Finance, of the quantity of untaxed cigarettes which may be delivered, and 4) after completion of the sale, forward to the Department of Taxation and Finance a copy of the retailer's tax exempt coupon, a document issued by the Department and entitling the retailer to receive a predetermined maximum quantity of untaxed cigarettes.

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[1]The Tribe or Nation may submit statistical information relating to probable demand, or the Department of Taxation will calculate the demand based upon average New York consumption per capita (20 NYCRR 335.7[d][2]).

II

Plaintiffs are business enterprises which sell cigarettes at wholesale to Indians on various Indian reservations in New York State. They commenced these actions claiming that the regulations, which impose additional burdens on their dealings with the Indians, are preempted by the Indian trader statutes (25 USC §§261 *et seq.*). The trial court granted plaintiffs' motion for summary judgment, and the Appellate Division initially affirmed. It found that "the tax scheme under review here fails because it imposes some burden, although only minimal, on the Indian trader contrary to the Court of Appeals interpretation of the applicable Supreme Court decisions" (relying on *Herzog Bros. Trucking v State Tax Commn*, 69 NY2d 536, *vacated and remanded*, 487 US 1212, *affd on remand*, 72 NY2d 720).

On appeal, the United States Supreme Court vacated the judgment and remanded to the Appellate Division "for further consideration in light of *Oklahoma Tax Commn v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US ____, 111 S Ct 905, 112 L Ed 2d 1112)." Upon reconsideration, the Appellate Division reversed itself, reading the *Potawatomi* decision to indicate that the "minimal burdens" imposed upon Indian traders by New York's tax scheme are not barred by federal pre-emption, a holding which would create considerable uncertainty about the reasoning underlying our decision in *Herzog*.

III

In *Herzog Bros. Trucking v State Tax Commn* (69 NY2d 536), fuel distributors challenged a State motor fuel tax assessed against them. Like the cigarette tax, the motor fuel tax was designed to be paid ultimately by the consumer as it

passed through the distribution chain. The legislation initially imposed a tax on wholesale sales of motor fuel to Indian retailers on Indian reservations but allowed a refund to distributors for previously paid taxes on fuel sold to Indians exempt from taxation. The Federal Indian trader statutes (25 USC §§261 *et seq.*), enacted pursuant to article 1, §8, cl. 3 of the Federal Constitution, vest the Commissioner of Indian Affairs with the sole power and authority to regulate trade with Indians and, because the tax scheme in *Herzog* imposed obligations upon wholesale Indian traders, we held that it was pre-empted by federal law (*see, Herzog Bros. Trucking v State Tax Commn*, 69 NY2d at 545-546). Upon remand from the United State's Supreme Court, we adhered to that determination (*see, Herzog Bros. Trucking v State Tax Commn*, 72 NY2d 720). We conclude the regulations at issue in [t]his case suffer from the same infirmity.

IV

As a general proposition Congress has pre-empted the field of regulating Indian traders. As the Supreme Court stated when referring to the Indian trader statutes and the regulations promulgated thereunder by the Commissioner of Indian affairs, "[t]hese apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders" (*see, Warren Trading Post Co. v Arizona Tax Commn*, 380 US 685, 690).

Notwithstanding the body of law supporting this view, defendants contend that "minimal burdens" may be placed upon wholesale distributors, i.e. Indian traders, if the tax is ultimately borne by non-Indian consumers and the tax

scheme is designed merely to prevent the evasion by those consumers of a legally imposed tax. They rely principally on two Supreme Court decisions in which the Court approved tax schemes which required Indian retailers to collect a tax validly imposed on non-Indian purchasers (*see, Moe v Confederated Salish & Kootenai Tribes*, 425 US 463; *Washington v Confederated Tribes of Colville Indian Reservation*, 447 US 134). Explaining the result in *Colville*, the Court stated that: "[t]he Indian trader statutes . . . incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange [citing, *Warren Trading Post Co. v Tax Commn, supra*], *but no similar intent is evident with respect to sales by Indians to nonmembers of the Tribe*" (*see, Washington v Confederated Tribes of Colville Indian Reservation, supra*, 447 US at 155-156 [emphasis added]). Thus, the Supreme Court deemed it acceptable to place "minimum burdens" upon Indian retailers selling goods to non-Indians to aid a State in collecting and enforcing its taxes validly imposed upon non-Indian purchasers (*see, Washington v Confederated Tribes of Colville Indian Reservation, supra*, 447 US at 159).

Defendants assert that the tax regulations at issue here are substantially the same as those at issue in *Moe* and *Colville*.They contend that inasmuch as the Supreme Court approved the imposition of precollection and recordkeeping requirements on Indian retailers in those cases, the State can lawfully impose them on wholesalers, who are just one step further back on the distribution chain. *Moe* and *Colville* involved burdens placed on Indian retailers dealing with non-Indians, rather than on wholesalers dealing with Indians, a significant difference, but defendants contend that a subsequent decision of the Supreme Court, *Oklahoma Tax Commn v Citizen Band Potawatomi Indian Tribe of Oklahoma* (498 US ____, 111 S Ct 905, 112 L Ed 2d 1112), makes it clear that a State's interest in enforcing its taxes may also justify the imposition of certain regulatory burdens on wholesalers supplying Indian retailers as an aid to enforcement of State tax laws. Indeed, the Supreme Court remanded the instant case to the Appellate Division for further consideration in light of the *Potawatomi* case.

V

In *Potawatomi*, the Supreme Court held that Oklahoma could not bring suit against the Potawatomi tribes for payment of uncollected cigarette taxes due for past sales made on the reservation (*see, Oklahoma Tax Commn v Citizen Band Potawatomi Indian Tribe of Oklahoma, supra*). Because the State sued the Tribe seeking payment for past taxes, the Court's decision was based upon the doctrine of sovereign immunity rather than on the Indian trader statutes. Oklahoma, noting that the *Moe* and *Colville* decisions gave states a right to require Indian retailers to collect a state-imposed cigarette tax on their sales to non-Indians, contended that if the tribes were immune from suit these decisions gave the states a right without a remedy. In response to that contention, the Supreme Court stated:

> There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State [citation omitted]. And under today's decision, *States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes*

> *off the reservation*, Colville, *supra*, at 161-162 . . . *or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, City Vending of Muskogee, Inc. v Oklahoma Tax Commn* 898 F2d 122 (CA10 1990).

(*Oklahoma Tax Commn v Citizen Bank Potawatomi Indian Tribe of Oklahoma, supra*, 112 L Ed 2d at 1123 [emphasis added]). Defendants here rely on this underscored language, claiming it establishes that states may impose some burden on wholesalers supplying goods to Indian retailers to assist in the collection of valid State taxes. However, we do not interpret the Supreme Court's statement as altering the established rule stated in *Warren Trading Post Co. v Arizona Tax Commn* (*supra*, 380 US at 690) that Congress has taken the matter of regulating Indian traders so fully in hand that no room remains for state laws imposing additional burdens upon them. The language cites none of the relevant decisions in this area and, as interpreted by defendants, is contrary to the present state of the law on the subject. In the past, the Supreme Court has approved of cigarette seizures from wholesalers only where 1) the tribes to whom the cigarettes are to be sold have refused to fulfill tax collection and remittance obligations incurred on past sales, and 2) the seizures take place off the reservation "where state power over Indian affairs is considerably more expansive that it is within reservation boundaries" (*see, Washington v Confederated Tribes of Colville Indian Reservation, supra*, 447 US at 161-162). Here, the State is not seeking to collect taxes due on past sales, but is attempting, prospectively, to collect a tax on sales to be made *directly on the reservation*.

Just when "assessing wholesalers who supplied unstamped cigarettes to the tribal stores" would be justified remains unclear from the Supreme Court's decision, al-

though its use of the past tense "supplied" indicates that the method might somehow be used to retroactively collect taxes unpaid on past sales. But we do not read the Court's suggestions for collection remedies as altering the established law regarding federal preemption or validating comprehensive regulation by a state of the relationship between Indian traders and their Indian purchasers.

VI

To the extent that the Supreme Court's decision in *Moe, Colville* and *Potawatomi* may be read as validating the imposition of minimal burdens on Indian retailers and Indian traders, we conclude that the tax regulations at issue here impose *significant* burdens on the wholesaler. They dictate to Indian traders the number of unstamped cigarettes they can sell to reservation Indians and direct with whom they may trade (*see*, 20 NYCRR §335.7[b][3]; §335.7[c]; §335.7[d][6]). The tax scheme requires wholesale distributors to prepay taxes on all cigarettes delivered on the reservations in excess of the predetermined maximum amount and, with respect to those cigarettes, imposes a sales tax on Indian retailers.

While the State's efforts to avoid what it perceives as pervasive tax avoidance by non-Indians is understandable, this tax scheme attempts to regulate in an area which Congress has taken "fully in hand" (*see, Warren Trading Post Co. v Arizona Tax Commn, supra*, 380 US at 690). It impinges on the federal interest, as evidenced by the Indian trader statutes, to "comprehensively . . . regulate businesses selling goods to reservation Indians" (*see, Washington v Confederated Tribes of Colville Indian Reservation, supra*, 447 US at 155), and it impinges on the authority of the Commissioner of Indian Affairs to determine "the kind and quantity of goods and the prices at which such goods

shall be sold to the Indians" (*see*, 25 USC §261). Furthermore, to the extent that the sales tax is imposed on all stamped cigarettes, the regulations place "financial burdens on [plaintiffs] or the Indians with whom [they] deal [ ] in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner" (*see, Warren Trading Post Co. v Arizona Tax Commn, supra*, 380 US at 691). Manifestly, the tax regulations before us regulate trade with Indians to a significant degree. As such, they are barred by Federal preemption and cannot be applied to cigarette wholesale dealers involved in trading with Indians on reservations located in New York State.

Accordingly, the order of the Appellate Division should be reversed, with costs, the respective plaintiff's motions for summary judgment granted, the defendants' cross motions to dismissed or for summary judgment denied, and judgment granted to plaintiffs in accordance with this opinion.

* * *

Order reversed, with costs, plaintiffs' motions for summary judgment granted, defendants' cross motions to dismiss the actions or for summary judgment denied, and judgment granted to plaintiffs in accordance with the opinion herein. Opinion by Judge Simons. Chief Judge Kaye and Judges Titone, Hancock, Bellacosa and Smith concur.

Decided June 10, 1993

This opinion is uncorrected and subject to revision before publication in the New York Reports.

APPENDIX C—Opinion and Order of Appellate Division, Third Department.

SUPREME COURT—APPELLATE DIVISION

THIRD JUDICIAL DEPARTMENT

Decided and Entered: July 9, 1992 60199

MILHELM ATTEA & BROTHERS INC., Also Known as MILHELM ATTEA & BROTHERS INC.,

Respondent,

v

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK *et al.*,

Appellants.

(And Another Related Action.)

Calendar Date: June 2, 1992

Before: Weiss, P.J., Mikoll, Levine, Mercure and Harvey, JJ.

Robert Abrams, Attorney-General (Lew A. Millenbach of counsel), Albany, for appellants.

Zdarsky, Sawicki & Agostinelli (Joseph Zdarsky of counsel), Buffalo, for Milhelm Attea & Brothers Inc., respondent.

Williams, Stevens, McCarville & Frizzell, P.C. (Timothy M. O'Mara of counsel), Buffalo, for Elias H. Attea Jr., respondent.

Duker & Barrett (George F. Carpinello of counsel), Albany, for Oneida Indian Nation of New York, *amicus curiae*.

Roland, Fogel, Koblenz & Carr (Emilio Petroccione of counsel), Albany, for Empire State Petroleum Association Inc., *amicus curiae*.

MIKOLL, J.

Appeal, upon remand from the United States Supreme court, from an order and judgment of the Supreme Court (Cheeseman, J.), entered August 22, 1989 in Albany County, which, *inter alia*, declared portions of 20 NYCRR parts 331 and 335 to be unconstitutional, and enjoined and restrained defendants from taking any steps to implement said regulations.

This matter is before us on remand from the United States Supreme Court for further consideration in light of its recent opinion in *Oklahoma Tax Commn. v. Citizen Band Potawatomi Indian Tribe of Okla.* (498 US ____, 111 S Ct 905). The underlying facts are set out in this court's prior decision (164 AD2d 300, *appeal dismissed* 77 NY2d 989, *lv denied* 78 NY2d 858, *vacated* ____ US ____, 112 S Ct 926).

In our initial review of the matter, we held that *Herzog Bros. Trucking v State Tax Commn.* (72 NY2d 720, 724-725) compelled invalidation of the tax scheme in issue here on the ground of Federal preemption. We found that the scheme placed a burden upon wholesalers known as Indian traders, who are licensed by the Federal government to trade with Indians (*see*, 25 USC § 261 *et seq.*), and that Congress had preempted the field of regulating trade with Indians on reservations (*see, id.*), thus foreclosing the imposition of supplementary State tax laws that impose burdens on Indian traders (164 AD2d 300, *supra*).

We note that the Federal preemption issue presented by the tax scheme in the instant case was not before the Supreme Court in *Oklahoma Tax Commn.* The Supreme Court indicated, however, in response to concerns based upon Indian sovereign immunity vis-a-vis enforcement of a scheme where Indians were required to collect and remit taxes due for sales to non-Indians, that "under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation * * * or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores" (*Oklahoma Tax Commn. v Citizens Band Potawatomi Indian Tribe of Okla.*, at 912 [citation omitted]).

From this we conclude that the Supreme Court is of the view that not all burdens placed upon Indian traders by states attempting to implement and enforce tax schemes aimed at taxing sales by Indian retailers to non-Indians made on Indian reservations are impermissible. The Supreme Court's observations call into question the continued

validity of the legal analysis underpinning the Court of Appeals' decision in *Herzog Bros. Trucking v State Tax Commn.* (69 NY2d 536, *vacated* 487 US 1212) and again considered by that court upon remand from the Supreme Court (*see, Herzog Bros. Trucking v State Tax Commn.*, 72 NY2d 720, *supra*) and which opinion was the legal underpinning for our holding in this matter (164 AD2d 300, *supra*).[1]

We now hold that minimal burdens such as are prescribed by the tax scheme promulgated pursuant to 20 NYCRR 335.5 upon Indian traders in collecting sales taxes on sales by Indian retailers to non-Indian purchasers made on Indian reservations are not barred by Federal preemption of the field of regulating trade with Indians (*see*, 25 USC § 261 *et seq.*).

Weiss, P.J. Levine, Mercure and Harvey, JJ., concur.

ORDERED that the order and judgment is reversed, on the law, without costs, motions denied, cross motions granted, summary judgment awarded to defendants and it is declared that those portions of 20 NYCRR parts 331 and 335 at issue herein have not been shown to be unconstitutional.

ENTER:
/s/MICHAEL J. NOVACK
MICHAEL J. NOVACK
Clerk

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[1]We note that the regulations at issue here are not the same as those addresed by the Court of Appeals in *Herzog Bros. Trucking*.

APPENDIX D—Order of United States Supreme Court Granting Petitioners' Petition for a Writ of Certiorari.

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

Washington, D. C. 20543

January 21, 1992

Mr. Jerry Boone
Solicitor General
The Capitol
Albany, NY 12224

Re: Department of Taxation and Finance of New York, *et al. v. Milhelm Attea & Bros., Inc., aka Milhelm Attea & Brothers, Inc., et al.*
No. 91-907

Dear Mr. Boone:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Appellate Division, Supreme Court of New York, Third Judicial Department, for further consideration in light of *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U. S. ____ (1991).

Very truly yours,

WILLIAM K. SUTER, Clerk

RECEIVED
Jan 27 1992
Department of Law
Albany Office
Office of Legal Records
Docket Clerk

APPENDIX E—Original Opinion of Appellate Division, Third Department.

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

December 6, 1990

MILHELM ATTEA & BROTHERS, INC., Also Known as MILHEM ATTEA & BROTHERS, INC.,

Respondent,

v

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK *et al.*,

Appellants.

(And Another Related Action.)

Argued, October 6, 1990.

Before:

Hon. Leonard A. Weiss, Justice Presiding

Hon. Ann T. Mikoll, Hon. Howard A. Levine, Hon. Thomas E. Mercure, Hon. Norman L. Harvey, Associate Justices.

APPEAL from an order and judgment of the Supreme Court (PAUL E. CHEESEMAN, J.), entered August 22, 1989 in Albany County, which, *inter alia*, declared certain portions of 20 NYCRR parts 331 and 335 to be unconstitutional.

ROBERT ABRAMS, Attorney-General (Lew A. Millenbach of counsel), The Capitol, Albany, New York 12224, for appellants.

KAVINOKY & COOK (Joseph E. Zdarsky of counsel), 120 Delaware Avenue, Buffalo, New York 14202, for Milhelm Attea & Brothers, Inc., respondent.

WILLIAMS, STEVENS, McCARVILLE & FRIZZELL, P.C. (Timothy M. O'Mara of counsel), 1920 Liberty Building, Buffalo, New York 14202, for Elias H. Attea, Jr., respondent.

MIKOLL, J.

Plaintiff in action No. 1, Milhelm Attea & Brothers, Inc. (hereinafter Attea Brothers), a wholesale dealer of cigarettes

licensed under Tax Law § 480, is a New York corporation with its principal place of business in Erie County. Almost 75% of its sales are to Indians on Indian reservations in New York. Plaintiff in action No. 2, Elias H. Attea, Jr., also sells cigarettes wholesale to Indians on Indian reservations in New York.

The Tax Law imposes a cigarette tax on all cigarettes possessed in this State for sale "except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax" (Tax Law § 471 [1]). Sale of cigarettes on Indian reservations to Indians for personal consumption are exempt from State taxation (20 NYCRR 335.5 [2]). Pursuant to regulations applicable to sales made after January 1, 1989, a tax is imposed on cigarettes sold at wholesale to Indians on Indian reservations for retail sale to non-Indians (*see*, 20 NYCRR 331.4, 331.5, 331.6, 331.7, 331.8, 331.9, 331.10, 335.5). Wholesalers may purchase, tax free, a quantity of cigarettes determined by defendant Department of Taxation and Finance (hereinafter the Department) to be the amount needed to supply the personal needs of the Indian consumers (20 NYCRR 335.5). Thus, the quantity of tax-free cigarettes which may be sold by the wholesalers is limited (20 NYCRR 335.5 [e]). Further, record-keeping requirements are imposed on the wholesalers (*see, e.g.*, 20 NYCRR 337.3) and applications for refunds for exempt sales upon which the tax was prepaid may be necessary (*see, e.g.*, 20 NYCRR 340.1).

Plaintiffs commenced the instant declaratory judgment actions seeking to have the new regulations declared invalid and to enjoin their enforcement. Subsequently, both plaintiffs moved for a preliminary injunction restraining enforcement of the new regulations. The motions were granted. Thereafter, motions were made by the respective parties for summary judgment. Supreme Court granted

plaintiffs' summary judgment motions for the relief demanded in the complaint and denied defendants' cross motions. The court also permanently enjoined defendants from, *inter alia*, enforcing the regulations. This appeal by defendants ensued.

The issues presented here are similar to those considered by the Court of Appeals in *Herzog Bros. Trucking v. State Tax Commn.* (69 NY2d 536) and again considered by that court (72 NY2d 720) upon remand from the United States Supreme Court (*State Tax Commn. of State of N.Y. v. Herzog Bros. Trucking*, 487 US 1212). As here, the plaintiff in *Herzog* was a wholesaler selling a product, in that case motor fuel, to Indians on a reservation who then sold it at retail to Indian and non-Indian consumers. There, the wholesaler was to collect the fuel tax upon the first sale and the tax was then included in the retail price and passed on to the ultimate consumer (*see, Herzog Bros. Trucking v. State Tax Commn.*, 72 NY2d 720, 723, *supra*). A refund or credit was made where the ultimate consumer was an Indian (*id.*). When the Court of Appeals initially heard the case, it reversed this court's decision which had found the tax scheme valid (*Herzog Bros. Trucking v. State Tax Commn.*, 69 NY2d 536, *supra, revg.* 122 AD2d 518). The Court of Appeals at that time held that:

> * * * Congress has preempted the field of regulating trade with Indians on reservations and has left "no room" for the application of supplementary State tax laws, such as the one here at issue, that impose "additional burdens" on Indian traders * * *. Thus, no matter how minimal the burden imposed on the motor fuel taxation scheme on [the plaintiff], as a trader to the Seneca Nation, such regulation is preempted by the Federal Indian trader laws * * * (*id.*, at 546 [citation omitted]).

When the first *Herzog* case went to the United States Supreme Court, the case was remanded (*State Tax Commn. of State of N.Y. v. Herzog Bros. Trucking*, 487 US 1213, *supra*) to the Court of Appeals to consider the effect of the motor fuel tax scheme contained in newly enacted regulations effective November 30, 1988 and applicable to sales made after January 1, 1989. Those regulations differed from the regulations originally in issue (*Herzog Bros. Trucking v. State Tax Commn.*, 69 NY2d 56, *supra*), but are substantially similar to those at issue in the instant case. The regulations originally in issue in *Herzog* required the wholesaler to prepay sales tax on all fuel sold and apply for a refund or credit of tax paid where the ultimate sale was tax exempt. During the pendency of *Herzog*, the Department published for comment new regulations which, like the regulations now before the court, provided for preapproval of tax-free sales to Indians by registered dealers. No tax was to be paid on fuel designated for such sales at any point in the transaction (20 NYCRR 414.7 [a] [3]). The amount of fuel which would be preapproved for tax-free sale was set by the Department based on projected Indian consumption (20 NYCRR 414.7 [a] [2]; [b]). On remand from the United States Supreme Court for consideration of the case in light of the newly published regulations, the Court of Appeals refused to review the constitutionality of those regulations, reasoning that to do so would be to render an advisory opinion (*Herzog Bros. Trucking v. State Tax Commn.* 72 NY2d 720, 725, *supra*).

This court is now called upon to address the constitutionality of similar regulations. When the Court of Appeals heard *Herzog* on remand, it referred to its analysis of the case law on the issue in the first *Herzog* case and opined that "[i]n the absence of a reversal by the Supreme Court, we assume that our interpretation of those decisions and our

application of them to the facts before us represents the present state of the law on the subject" (*id.*, at 724-725). Accordingly, the tax scheme under review here fails because it imposes some burden, although only minimal, on the Indian trader contrary to the Court of Appeals' interpretation of the applicable Supreme Court decisions (*see, id., see also, Warren Trading Post Co. v. Arizona Tax Commn.*, 380 US 685, 690; *Herzog Bros. Trucking v. State Tax Commn.*, 69 NY2d 536, 546, *supra*).

We note that this court's decision in *Matter of DeLoronde v. New York State Tax Commn.* (142 AD2d 90, *appeal dismissed, lv denied* 73 NY2d 986) was rendered November 23, 1988 without the benefit of the decision on remand in *Herzog*, which was rendered December 22, 1988.

Opinion by MIKOLL, J., in which WEISS, J.P., LEVINE, MERCURE and HARVEY, JJ., concur.

Order and judgment affirmed, with costs.

APPENDIX F—Original Order of Appellate Division, Third Department.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 9th day of October, 1990.

PRESENT:

HON. LEONARD A. WEISS,
Justice Presiding,
HON. ANN T. MIKOLL
HON. HOWARD A. LEVINE
HON. THOMAS E. MERCURE
HON. NORMAN L. HARVEY,
Associate Justices.

MILHELM ATTEA & BROS., INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Plaintiff-Respondent,

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and JAMES W. WETZLER, Commissioner of Taxation and Finance of the State of New York and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Appellants-Defendants.

(FIRST ACTION)
County Clerk's Index No. 7-89

and

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Plaintiff-Respondent,

v.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Appellants-Defendants.

(SECOND ACTION)
County Clerk's Index No. 8-89

Defendants-Appellants, Department of Taxation and Finance of the State of New York, James W. Wetzler, Commissioner of Taxation and Finance of the State of New York, and the Tax Appeals Tribunal of the State of New York, having appealed from an ORDER AND JUDGMENT of the Supreme Court of the State of New York, Albany County, entered on the 22nd day of August, 1989, in the office of the Clerk of the County of Albany, and said appeal having been presented during the above-stated term of this court, and having been argued by Robert Abrams, Attorney General of the State of New York (Lewis A. Millenbach, Esq. of Counsel) for appellant, and by Kavinoky & Cook (Joseph E. Zdarsky, Esq. of Counsel) for respondent in the First Action, and by Williams, Stevens, McCarville & Frizzell, P.C. (Timothy O'Mara, Esq. of Counsel) for respondent in the Second Action, and, after due deliberation, the court having rendered a decision on the 6th day of December, 1990 (Opinion per Mikoll, J.), it is hereby

ORDERED that the Order and Judgment so appealed from be and the same hereby are affirmed, with costs.

ENTER:

/s/ MICHAEL J. NOVACK
Clerk

DATED AND ENTERED: January 8, 1991
A TRUE COPY
Michael J. Novack
Clerk

APPENDIX G—Opinion of Supreme Court, Albany County.

STATE OF NEW YORK

SUPREME COURT—COUNTY OF ALBANY

MILHELM ATTEA & BROS. INC., a/k/a MILHELM ATTEA & BROTHERS, INC. a/k/a MILHELM ATTEA & BROTHERS, INC. 1509 Clinton Street, Buffalo, New York 14206,

Plaintiff,

against

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, Commissioner of Taxation and Finance of the State of New York and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Plaintiff,

against

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION & FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

(Supreme Court, Albany County Motion Term)
(RJI No. 01-89-017022; 01-89-017023)

(Justice Paul E. Cheeseman, Presiding)

APPEARANCES:

Kavinoky & Cook, Esqs.
Attorneys for Milhelm Attea & Sons
Joseph E. Zdarsky, of Counsel
120 Delaware Avenue
Buffalo, New York 14202

Williams, Stevens, McCarville & Frizzell, P.C.
Attorneys for Elias H. Attea, Jr.
Timothy M. O'Mara of Counsel
1920 Liberty Building
Buffalo, New York 14202

Hon. Robert Abrams, Attorney General of the State of New York
Attorneys for Defendant
Richard Freshour, Assistant Attorney General, of Counsel
The Capitol
Albany, New York 12224

CHEESEMAN, J.:

The two above captioned plaintiffs each commenced a declaratory judgment action against the Commissioner of Taxation and the Department of Taxation concerning the certain imposition by the State of New York of its cigarette taxes upon plaintiff's sale of cigarettes made to Indians on Indian Reservations located within the state's territorial

boundaries. The defendant moves to dismiss the action for failure to exhaust their administrative remedies, or in the alternative for summary judgment.

Plaintiffs move for summary judgment seeking an order declaring among other things that the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States.

The plaintiff, Milhelm Attea and Bros. Inc. is a New York Corporation with its principal place of business in Erie County New York. This corporation is a wholesale dealer of cigarettes licensed under New York Tax Law Section 480. The corporation is engaged in the wholesale distribution of sale of cigarettes in New York. A substantial part of the corporation's business is the distribution and wholesale of cigarettes to Indians on Indian Reservations. The plaintiff, Elias H. Attea, Jr. is also engaged in the wholesale distribution and sale of cigarettes. Mr. Attea's business is exclusively with Indians on Indian Reservations within the territorial boundaries of the State of New York.

New York State Tax Law Section 471[1] imposes a cigarette tax on all cigarettes possessed in this state for sale "except that no tax shall be imposed on cigarettes sold under such circumstances that this State is without power to impose such tax." (Tax Law Section 471[1]).

On August 29, 1988, the Commissioner of Taxation and Finance adopted a new cigarette regulation seeking, among other things to apply New York's Tax Law to sales of cigarettes made by cigarette wholesalers such as the two plaintiffs herein, to Indians on Indian Reservations.

The plaintiffs contend that the application of New York's Tax Law and the imposition of a state cigarette tax with

respects to its wholesale transaction with Indians on Indian Reservations are pre-empted by Federal Law. (Article 1, Section 8, clause 3 of the United States Constitution). This clause of the Constitution grants Congress the sole power to regulate commerce with Indian tribes. Pursuant to this delegation of power, Congress enacted the Indian traders statutes, 25 U.S.C. Section 261 *et seq*. which granted the Commissioner of Indian Affairs the sole power and authority with regard to the regulation of trading with Indians on Indian Reservations.

The State contends that there is currently occurring in various sections of the State a systematic practice of tax evasion of monumental proportions involving the retail sale of both cigarettes and motor fuel on Indian reservations to non-Indian purchasers. This practice plaintiff argues is costing the State enormous sums in lost revenues and is also seriously harming off-reservation businesses in the adjacent areas.

The State also contends that the Indian Trader statutes are not to be given automatic effect, but must be analyzed on a case by case basis.

The issue before us has, in our opinion, been disposed of by the New York Court of Appeals in a case involving wholesale sales of motor fuel to Indians on Indian Reservations. The Court of Appeals held *Herzog Brothers Trucking, Inc. v. State Tax Commission,* 69 NY2d 536 that the Federal Indian Trader Laws pre-empted State regulation of any person trading with Indians on Indian Reservations.

The United States Supreme Court pursuant to a summary reconsideration order, granted a petition for a writ of certiorari, vacating the judgment of the Court of Appeals and remanded the case to the Court of Appeals for further consideration in light of new motor fuel tax regulations which were proposed by the defendants subsequent to the

Court of Appeals' decision in *Herzog (State Tax Commission of the State of New York v. Herzog Brothers, Inc.* ____ U.S. ____, 108 S.Ct. 2861 [1988]). On December 22, 1988, the Court of Appeals reaffirmed its May 7, 1987 decision in all respects and specifically rejected the argument that its prior decision was overly broad because it barred all taxation and regulation of sales to Indians on Indian Reservations. (*Herzog Brothers Trucking Inc. v. State Tax Commission*, 72 NY2d 720.

On the facts in the case before us we see no distinction between the attempted imposition of a cigarette tax by the State as compared to the attempted imposition of a motor fuel tax.

According, under the authority of the Court of Appeals in the *Herzog* case, the plaintiffs' motion for summary judgment is in all respects granted. Defendant's motion to dismiss or, in the alternative for summary judgment, is in all respects denied.

PAUL E. CHEESMAN
J.S.C.

Dated: June 5th 1989
At Albany, New York

APPENDIX H—Order and Judgment of Supreme Court, Albany County.

At a term of the Supreme Court of the State of New York held in and for the County of Albany at the Albany County Courthouse on the 30th day of May, 1989.

SUPREME COURT: COUNTY OF ALBANY

STATE OF NEW YORK

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC. a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Plaintiff,

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and JAMES W. WETZLER, Commissioner of Taxation and Finance of the State of New York and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

(First Action)
Index No. 7-89
RJI No. 0189017023

Justice Assigned: Hon. Paul E. Cheesman

and

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Plaintiff,

v.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

(Second Action)
Index No. 8-89
RJI No. 0189017022
Justice Assigned: Hon. Paul E. Cheeseman

Order and Judgment Granting Declaratory Judgment and Permanent Injunction

Plaintiffs in each of the above referenced actions, having each made a motion for an Order and Summary Judgment

pursuant to CPLR §3212 declaring: (1) that the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiffs to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States enacted pursuant thereto; (2) that, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the Tax Law of the State of New York, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiffs to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and purports to impose such cigarette taxes with respect to such sales, it is unconstitutional and/or preempted by federal law; and (3) that the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made by plaintiffs to Indians on Indian reservations within the territorial boundaries of the State of New York, and by reason thereof, regulations adopted by defendants, insofar as they purport to provide that such sales are subject to New York State taxes or regulation, are null and void and of no force and effect; and plaintiffs having also moved for summary judgment against the defendants, and each of them, and all of their respective agents, employees and others under their control, permanently enjoining and restraining said defendants and persons: (1) from determining, collecting, or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore made or hereafter made by plaintiffs to Indians on Indian reservations within the territorial boundaries of the State of New York; (2) from commencing or causing to be commenced, or maintaining, under

the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiffs by reason of or in connection with said sales; and (3) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or regulations adopted by defendants by reason of or in connection with such sales; and the defendants having cross-moved to dismiss each of the actions for the plaintiffs' failure to exhaust their administrative remedies, or, in the alternative, for summary judgment,

NOW, THEREFORE, as to the first action referred to above, upon reading and filing the Notice of Motion for Summary Judgment dated March 31, 1989, the affidavit of Rosemary Saffire, sworn to the 31st day of March, 1989, the affidavit of Joseph E. Zdarsky, sworn to the 27th day of May, 1989, and the respective exhibits annexed thereto, all in support of the motion of the plaintiff in the first action and upon reading and filing the defendant's Notice of Cross-Motion for Summary Judgment dated May 19, 1989, the affidavit of Jamie Woodward, sworn to the 18th day of May, 1989, the affidavit of William F. Collins, sworn to the 19th day of May, 1989, and the respective exhibits annexed thereto, all in opposition to the motion of the plaintiff in the first action and in support of the defendants' cross-motion, and upon all the pleadings and proceedings heretofore had in the first action; and, as to the second action referred to above, upon reading and filing the Notice of Motion dated April 24, 1989, the affidavit of Elias H. Attea, Jr., sworn to the 24th day of April, 1989, the affidavit of Timothy M. O'Mara, sworn to the 30th day of May, 1989, and the respective exhibits annexed thereto, all in support of the plaintiff's motion in the second action, and upon reading and filing the defendants' Notice of Cross-Motion dated the

19th day of May, 1989, the affidavit of Jamie Woodward, sworn to the 18th day of May, 1989, the affidavit of William F. Collins, sworn to the 19th day of May, 1989, and the respective exhibits annexed thereto in opposition to the plaintiffs' motion in the second action and in support of the defendants' cross-motion, and upon all pleadings and proceedings heretofore had in the second action, and after hearing Kavinoky & Cook, Joseph E. Zdarsky, Esq., of counsel, attorneys for Milhelm Attea & Bros., Inc., the plaintiff in the first action referred to above in support of the motion of the plaintiff in said action, and in opposition to the defendants' cross-motion; and Williams, Stevens, McCarville & Frizzell, P.C., Timothy M. O'Mara, Esq., of counsel, attorneys for Elias H. Attea, Jr., the plaintiff in the second action referred to above, in support of the motion of the plaintiff in said action and in opposition to the defendants' cross-motion, and the Hon. Robert Abrams, Attorney General of the State of New York, Richard J. Freshour, Esq., Assistant Attorney General, of counsel, attorneys for the defendants in each of the actions in opposition to the said plaintiffs' motion and in support of the defendants' cross-motions; and due deliberation having been had thereon, and the court having rendered its written decision dated June 5, 1989; it is hereby

ORDERED, that the respective motions of Milhelm Attea & Bros., Inc., the plaintiff in the first action above, and Elias H. Attea, Jr., the plaintiff in the second action above, for summary judgment granting a declaratory judgment and permanent injunctive relief, be and the same hereby are in all respects granted; and it is further

ORDERED that the defendants' cross-motions to dismiss each of the above referenced actions or, in the alternative, for summary judgment, are in all respects denied; and it is further

ORDERED AND ADJUDGED, with respect to the first action,

(1) that the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiff Milhelm Attea & Bros., Inc. to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States enacted pursuant thereto;

(2) that, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the Tax Law of the State of New York, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiff Milhelm Attea & Bros., Inc. to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and purports to impose such cigarette taxes with respect to such sales, it is unconstitutional and/or preempted by federal law; and

(3) that the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made by plaintiff Milhelm Attea & Bros., Inc. to Indians on Indian reservations within the territorial boundaries of the

State of New York, and by reason thereof, regulations adopted by defendants on August 29, 1988, and as published in Sections 331.6, 331.7, 331.8, 331.9, 331.10 of Part 331 and Sections 335.3, 335.4 and 335.5 of Part 335 of Chapter III, Subchapter C of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, insofar as they purport to apply to such sales by plaintiff Milhelm Attea & Bros., Inc. and/or provide that such sales are subject to New York state taxes or regulation, are null and void and of no force and effect; and it is further

ORDERED and ADJUDGED, that the defendants, and each of them, and all of their respective agents, employees and others under their control, be and the same hereby are, permanently enjoined and restrained:

(1) from determining, collecting, or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore made or hereafter made by plaintiff Milhelm Attea & Bros., Inc. to Indians on Indian reservations within the territorial boundaries of the State of New York;

(2) from commencing or causing to be commenced, or maintaining, under the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff Milhelm Attea & Bros., Inc. by reason of or in connection with said sales; and

(3) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or regulations adopted by defendants, including but not limited to regulations adopted on August 29, 1988, and published in Sections 331.6, 331.7, 331.8, 331.9, 331.10 of

Part 331 and Sections 335.3 335.4 and 335.5 of Part 335 of Chapter III, Subchapter C of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by reason of or in connection with such sales by plaintiff Milhelm Attea & Bros., Inc. to Indians on Indian reservations within the boundaries of the State of New York; and it is further

ORDERED and ADJUDGED, with respect to the second action,

(1) that the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiff Elias H. Attea, Jr. to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the law of the United States enacted pursuant thereto;

(2) that, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the law, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiff Elias H. Attea, Jr. to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and purports to impose such cigarette taxes with respect to such sales, it is unconstitutional and/or preempted by federal law; and

(3) that the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made

by plaintiff Elias H. Attea, Jr. to Indians on Indian reservations within the territorial boundaries of the State of New York, and by reason thereof, regulations adopted by defendants on August 29, 1988, and as published in Sections 331.6, 331.7, 331.8, 331.9, 331.10 of Part 331 and Sections 335.3, 335.4 and 335.5 of Part 335 of Chapter III, Subchapter C of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, insofar as they purport to apply to such sales by plaintiff Elias H. Attea, Jr. and/or provide that such sales are subject to New York State taxes or regulations, are null and void and of no force and effect; and it is further

ORDERED and ADJUDGED, that the defendants, and each of them, and all of their respective agents, employees and others under their control, be and the same hereby are, permanently enjoined and restrained:

(1) from determining, collecting, or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore made or hereafter made by plaintiff Elias H. Attea, Jr. to Indians on Indian reservations within the territorial boundaries of the State of New York;

(2) from commencing or causing to be commenced, or maintaining, under the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff Elias H. Attea, Jr. by reason of or in connection with said sales; and

(3) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or regulations adopted by defendants, including but

not limited to regulations adopted on August 29, 1988, and published in Sections 331.6, 331.7, 331.8, 331.9, 331.10 of Part 331 and Sections 335.3 335.4 and 335.5 of Part 335 of Chapter III, Subchapter C of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by reason of or in connection with such sales by plaintiff Elias H. Attea, Jr. to Indians on Indian reservations within the territorial boundaries of the State of New York.

Dated: Albany, New York
Aug. 2, 1989

Hon. Paul E. Cheeseman,
Justice of the Supreme Court

ENTER:

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY CLERK'S OFFICE)

I, THOMAS G. CLINGAN, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy Order with the original thereof filed in this office on the 22nd day of Aug., 1989 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal this 22nd day of Aug., 1989.

Thomas G. Clingan, Clerk

Office of Albany County Clerk
Albany, N.Y.
Aug 22 2 58 PM '89

APPENDIX I—Statutory and Regulatory Provisions Involved.

25 USC:

§ 261. Power to appoint traders with Indians

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians. (Aug. 15, 1876, c. 289 § 5, 19 Stat. 200.)

§ 262. Persons permitted to trade with Indians

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.
(Mar. 3, 1901, c. 832, § 1, 31 Stat. 1066, Mar. 3, 1903, c. 994, § 10, 32 Stat. 1009.)

§ 263. Prohibition of trade by President

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so

long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

§ 264. Trading without license; white persons as clerks

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500; *Provided,* That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein; *And provided further,* That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior.

New York Tax Law:

§ 471. Imposition of cigarette tax

1. There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale on and after June first, nineteen hundred ninety-three, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax or sold to the United States or sold to or by a voluntary unincorporated organization of the armed forces

of the United States operating a place for the sale of goods pursuant to regulations promulgated by the appropriate executive agency of the United States, to the extent provided in such regulations and policy statements of such an agency applicable to such sales. Such tax on cigarettes shall be the at the rate of twenty-eight cents for each ten cigarettes or fraction thereof, provided, however, that if a package of cigarettes contains more than twenty cigarettes, the rate of tax on the cigarettes in such package in excess of twenty shall be fourteen cents for each five cigarettes or fraction thereof. Such tax is intended to be imposed upon only one sale of the same package of cigarettes. It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof.

2. It is intended that the ultimate incidence of and liability for the tax shall be upon the consumer, and that any agent or dealer who shall pay the tax to the tax commission shall collect the tax from the purchaser or consumer. Except as hereinafter provided, the tax shall be advanced and paid by the agent. The agent shall be liable for the collection and payment of the tax on cigarettes imposed by this article and shall pay the tax to the tax commission by purchasing, under such regulations as it shall prescribe, adhesive stamps of such designs and denominations as it shall prescribe. The tax on cigarettes may also be paid by or through the use of metering machines if the tax commission so prescribes. Agents, located within or without the state, shall purchase stamps and affix such stamps in the manner prescribed to packages of cigarettes to be sold within the state, in which case any dealer subsequently receiving such stamped packages of cigarettes will not be required to purchase and affix

stamps on such packages of cigarettes. Notwithstanding any other provision of this article, the tax commission may by regulation provide that the tax on cigarettes imposed by this article shall be collected without the use of stamps.

3. The amount of taxes advanced and paid by the agent as hereinabove provided shall be added to and collected as part of the sales price of the cigarettes.

§ 474. Records to be kept; examination

1. Every person who shall possess or transport any unstamped cigarettes upon the public highways, roads or streets of the state, shall be required to have in his actual possession invoices or delivery tickets for such cigarettes. Such invoices or delivery tickets shall show the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the cigarettes transported, and the name and address of the person who has or shall assume the payment of the tax. The absence of such invoices or delivery tickets shall be prima facie evidence that such person is a dealer in cigarettes in this state and subject to the provisions of this article.

2. Every person who shall possess or transport more than two hundred fifty cigars or more than five pounds of tobacco upon the public highways, roads or streets of the state, shall be required to have in his actual possession invoices or delivery tickets for such tobacco products. Such invoices or delivery tickets shall show the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the tobacco products transported, and the name and address of the

person who has or shall assume the payment of the tax and the wholesale price or the tax paid or payable. The absence of such invoices or delivery tickets shall be prima facie evidence that such person is a dealer in tobacco products in this state and subject to the requirements of this article.

3. Every dealer or distributor or employee thereof, or other person acting on behalf of a dealer or distributor, who shall possess or transport more than fifty cigars or more than one pound of tobacco upon the public highways, roads or streets of the state, shall be required to have in his actual possession invoices or delivery tickets for such tobacco products. Such invoices or delivery tickets shall show the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the tobacco products transported, and the name and address of the person who has or shall assume the payment of the tax and the wholesale price or the tax paid or payable. The absence of such invoices or delivery tickets shall be prima facie evidence that the tax imposed by this article on tobacco products has not been paid and is due and owing.

4. At the time of delivering cigarettes to any person each agent or wholesale dealer, and at the time of delivering tobacco products to any person each distributor or wholesale dealer of tobacco products, shall make a true duplicate invoice showing the date of delivery, the number of packages and number of cigarettes contained therein, in each shipment of cigarettes delivered, and the items and quantity and wholesale price of each item in each shipment of tobacco products delivered, and the name of the purchaser to whom delivery is made, and shall retain the same for a period of three years subject to the use and inspection

of the commissioner of taxation and finance. Each dealer shall procure and retain invoices showing the number of packages and number of cigarettes contained therein, in each shipment of cigarettes received by him, and the items and quantity and wholesale price of each item in each shipment of tobacco products received by him, the date thereof, and the name of the shipper, and shall retain the same for a period of three years subject to the use and inspection of the commissioner of taxation and finance. The commissioner of taxation and finance by regulation may provide that whenever cigarettes or tobacco products are shipped into the state, the railroad company, express company, trucking company or other public carrier transporting any shipment thereof shall file with the commissioner of taxation and finance a copy of the freight bill within ten days after the delivery in the state of each shipment. All dealers shall maintain and keep for a period of three years such other records of cigarettes or tobacco products received, sold or delivered within the state as may be required by the commissioner of taxation and finance. The commissioner of taxation and finance is hereby authorized to examine the books, papers, invoices and other records of any person in possession, control or occupancy of any premises where cigarettes or tobacco products are placed, stored, sold or offered for sale, and the equipment of any such person pertaining to the stamping of cigarettes or the sale and delivery of cigarettes or tobacco products taxable under this article, as well as the stock of cigarettes or tobacco products in any such premises or vehicle. To verify the accuracy of the tax imposed and assessed by this article, each such person is hereby directed and required to give to the commissioner of taxation and finance or his duly authorized representatives, the means, facilities and opportunity for such examinations as are herein provided for and required.

(As amended L.1989, c. 61, § 79.)

§ 481. Penalties and interest

1. (a)(i)(A) An agent or distributor or other person treated as a distributor pursuant to section four hundred seventy-one-d who or which fails to file a return or to pay any tax within the time required by or pursuant to this article (determined with regard to any extension of time for filing or paying) shall be subject to a penalty of ten per centum of the amount of tax determined to be due as provided in this article plus one per centum of such amount for each month or fraction thereof during which such failure continues after the expiration of the first month after such return was required to be filed or such tax became due, not exceeding thirty per centum in the aggregate.

(B) If a tax on cigarettes or on tobacco products under this article is not paid when due by any other person, the person liable for the payment of such tax shall be subject to a penalty of fifty per centum of the amount of such tax determined to be due as provided in this article plus one per centum of such amount for each month or fraction thereof during which such failure to pay continues after the expiration of the first month after such tax became due.

(C) In the case of a failure to file such return within sixty days of the date prescribed for filing of such return by or pursuant to this article (determined with regard to any extension of time for filing), the penalty imposed by this paragraph shall not be less than the lesser of one hundred dollars or one hundred per centum of the amount required to be shown as tax on such return. For the purpose of the preceding sentence, the amount of tax required to be shown

on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed upon the return.

(ii) If any amount of tax is not paid on or before the last date prescribed in this article for payment, interest on such amount at the underpayment rate set by the commissioner of taxation and finance pursuant to subdivision twenty-sixth of section one hundred seventy-one of this chapter shall be paid for the period from such last date to the date paid, whether or not any extension of time for payment was granted. Interest under this subparagraph shall not be paid if the amount thereof is less than one dollar.

(iii) If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit all or part of such penalty. The tax commission shall promulgate rules and regulations as to what constitutes reasonable cause.

(iv) If the failure to pay any tax within the time required by or pursuant to this article is due to fraud, in lieu of the penalties and interest provided for in subparagraphs (i) and (ii) of this paragraph, there shall be added to the tax (A) a penalty of fifty per centum of the amount of tax due, plus (B) interest on such unpaid tax at the underpayment rate set by the commissioner of taxation and finance pursuant to subdivision twenty-sixth of section one hundred seventy-one of this chapter for the period beginning on the last day prescribed by this article for the payment of such tax (determined without regard to any extension of time for paying) and ending on the day on which such tax is paid, plus (C) for the period beginning on the last day prescribed by this

article for the payment of such tax (determined without regard to any extension of time for paying) and ending on the day the amount of tax due is finally determined or, if earlier, on the day on which such tax is paid, an amount equal to fifty per centum of the interest payable under clause (B) of this subparagraph on that portion of the unpaid tax which is attributable to fraud.

(v) The penalties and interest provided for in this paragraph shall be determined, assessed, collected and paid in the same manner as the taxes imposed by this article and shall be disposed of as hereinafter provided with respect to moneys derived from the tax. Interest under this paragraph shall be compounded daily.

(b) In addition to any other penalty imposed by this article, the commissioner of taxation and finance may impose a penalty of not more than one hundred dollars for each two hundred cigarettes or fraction thereof in excess of two thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person. In addition, the commissioner may impose a penalty of not more than fifty dollars for each fifty cigars or one pound of tobacco or fraction thereof in excess of two hundred fifty cigars or five pounds of tobacco in the possession or under the control of any person and a penalty of not more than one hundred dollars for each fifty cigars or pound of tobacco or fraction thereof in excess of five hundred cigars or ten pounds of tobacco in the possession or under the control of any person, with respect to which the tobacco products tax has not been paid or assumed by a distributor or tobacco products dealer; provided, however, that any such penalty imposed shall not exceed five thousand dollars in the aggregate. The commissioner may impose a penalty

of not more than fifty dollars for each fifty cigars or one pound of tobacco, or fraction thereof, in excess of fifty cigars or one pound of tobacco in the possession or under the control of any tobacco products dealer or distributor appointed by the commissioner, and a penalty of not more than one hundred dollars for each fifty cigars or pound of tobacco, or fraction thereof, in excess of two hundred fifty cigars or five pounds of tobacco in the possession or under the control of any such dealer or distributor, with respect to which the tobacco products tax has not been paid or assumed by a distributor or a tobacco products dealer; provided, however, that any such penalty imposed shall not exceed ten thousand dollars in the aggregate. Any penalty provided for in this paragraph shall be determined as provided in section four hundred seventy-eight of this chapter, and may be reviewed only pursuant to such section. Such penalty shall be collected in the same manner as the taxes imposed by this article. The commissioner of taxation and finance, in his discretion, may remit all or part of such penalty. Such penalty shall be paid to the department of taxation and finance and disposed of as hereinafter provided with respect to moneys derived from the tax.

2. (a) The possession within this state of more than four hundred cigarettes in unstamped or unlawfully stamped packages or more than two hundred fifty cigars or more than five pounds of tobacco by any person other than an agent or distributor, as the case may be, at any one time shall be presumptive evidence that such cigarettes or tobacco products are subject to tax as provided by this article.

(b) Nothing in this section shall apply to common or contract carriers or warehousemen while engaged in lawfully transporting or storing tobacco products or unstamped

packages of cigarettes as merchandise, nor to any employee of such carrier or warehouseman acting within the scope of his employment, nor to public officers or employees in the performance of their official duties requiring possession or control of tobacco products or unstamped or unlawfully stamped packages of cigarettes, nor to temporary incidental possession by employees or agents of persons lawfully entitled to possession, nor to persons whose possession is for the purpose of aiding police officers in performing their duties.

3. For purposes of this chapter, the certificate of the commissioner of taxation and finance to the effect that a tax or fee imposed by this article has not been paid, that a return required by or under the provisions of this article has not been filed, or that information has not been supplied, as required by or under the provisions of this article, or that a bond or other security required by or pursuant to the provisions of this article has not been filed, or that books, accounts, records, memoranda, documents or papers have not been supplied as required by or pursuant to the authority of this article, or that a retail dealer or vending machine owner or operator is not currently or validly registered as required by this article shall be prima facie evidence that such tax or fee has not been paid, such return not filed, such information not supplied, such bond or other security not filed, that such books, accounts, records, memoranda, documents or papers have not been supplied, or that such retail dealer or vending machine owner or operator is not currently or validly registered.

4. Cross-reference: For criminal penalties, see article thirty-seven of this chapter.

§1814. Cigarette and tobacco products tax

(a) Attempts to evade or defeat tax.—(1) Any person who willfully attempts in any manner to evade or defeat any tax imposed by article twenty of this chapter or the payment thereof shall, in addition to other penalties provided by law, ~~be guilty of a misdemeanor.~~

(2) Any person who willfully attempts in any manner to evade or defeat the taxes imposed by article twenty of this chapter or payment thereof on (i) twenty thousand cigarettes or more (ii) twenty-two thousand cigars or more or (iii) four hundred forty pounds of tobacco or more or has previously been convicted two or more times of a violation of paragraph one of this subdivision shall be guilty of a class E felony.

(b) Willful failure to file a return or report, or pay tax.—Any person required under article twenty of this chapter to pay or make a return or report, who willfully fails to pay such tax or make such return or report, at the time or times so required, shall be guilty of a misdemeanor.

(c) Fraudulent returns, reports, statements or other documents.—(1) Any person who willfully makes and subscribes any return, report, statement or other document which is required to be filed with or furnished to the commissioner of taxation and finance or to any person, pursuant to article twenty of this chapter, which he does not believe to be true and correct as to every material matter shall be guilty of a misdemeanor.

(2) Any person who willfully delivers or discloses to the commissioner of taxation and finance or to any person pursuant to article twenty of this chapter, any list, return, report, account, statement or other document known by him to be fraudulent or to be false as to any material matter shall be guilty of a misdemeanor.

(3) For purposes of this section, the omission by any person of any material matter with intent to deceive shall constitute the delivery or disclosure of a document known by him to be fraudulent or to be false as to any material matter.

(d) Any person, other than an agent so authorized by the tax commission, who possesses or transports for the purpose of sale any unstamped or unlawfully stamped packages of cigarettes subject to tax imposed by section four hundred seventy-one of this chapter, or who sells or offers for sale unstamped or unlawfully stamped packages of cigarettes in violation of the provisions of article twenty of this chapter shall be guilty of a misdemeanor.

(e) Any person, other than an agent so authorized by the tax commission, who willfully possesses or transports for the purpose of sale twenty thousand or more cigarettes subject to the tax imposed by section four hundred seventy-one of this chapter in any unstamped or unlawfully stamped packages or who willfully sells or offers for sale twenty thousand or more cigarettes in any unstamped or unlawfully stamped packages in violation of article twenty of this chapter shall be guilty of a class E felony.

(f) For the purposes of this section, the possession or transportation within this state by any person, other than an agent, at any one time of five thousand or more cigarettes in unstamped or unlawfully stamped packages shall be presumptive evidence that such cigarettes are possessed or transported for the purpose of sale and are subject to the tax imposed by section four hundred seventy-one of this chapter. With respect to such possession or transportation any provisions of article twenty of this chapter providing for a time period during which a use tax imposed by such article may be paid on unstamped cigarettes or unlawfully or improperly stamped cigarettes or during which such cigarettes may be returned to an agent shall not apply. The possession within this state of more than four hundred cigarettes in unstamped or unlawfully stamped packages by any person other than an agent at any one time shall be presumptive evidence that such cigarettes are subject to tax as provided by article twenty of this chapter.

(g) Nothing in this section shall apply to common or contract carriers or warehousemen while engaged in lawfully transporting or storing unstamped packages of cigarettes as merchandise, or lawfully transporting or storing tobacco products, nor to any employee of such carrier or warehouseman acting within the scope of his employment, nor to public officers or employees in the performance of their official duties requiring possession or control of unstamped or unlawfully stamped packages of cigarettes or possession or control of tobacco products, nor to temporary incidental possession by employees or agents of persons lawfully entitled to possession, nor to persons whose possession is for the purpose of aiding police officers in performing their duties.

(h) Any willful act or omission, other than those described in subdivision (a),(b),(c),(d),(e),(f),(g),(i) or (j) of this section, by any person which constitutes a violation of any provision of article twenty of this chapter shall constitute a misdemeanor.

(i) Any person who falsely or fraudulently makes, alters or counterfeits any stamp prescribed by the tax commission under the provisions of article twenty of this chapter, or causes or procures to be falsely or fraudulently made, altered or counterfeited any such stamp, or knowingly and willfully utters, purchases, passes or tenders as true any such false, altered or counterfeited stamp, or knowingly and willfully possesses any cigarettes in packages bearing any such false, altered or counterfeited stamp, and any person who knowingly and willfully makes, causes to be made, purchases or receives any device for forging or counterfeiting any stamp, prescribed by the tax commission under the provisions of article twenty of this chapter, or who knowingly and willfully possesses any such device, shall be guilty of a class E felony. For the purposes of this subdivision, the words "stamp prescribed by the tax commission" shall include a stamp, impression or imprint made by a metering machine, the design of which has been approved by such commission.

(j)(1) Any dealer, other than a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, who shall knowingly transport or have in his custody, possession or under his control more than ten pounds of tobacco or more than five hundred cigars upon which the taxes imposed by article twenty of this chapter have not been assumed or paid by a distributor appointed by the commissioner of taxation and finance

under article twenty of this chapter, or other person treated as a distributor pursuant to section four hundred seventy-one-d of this chapter, shall be guilty of a misdemeanor punishable by a fine of not more than five thousand dollars or by a term of imprisonment not to exceed thirty days.

(2) Any person, other than a dealer or a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, who shall knowingly transport or have in his custody, possession or under his control more than fifteen pounds of tobacco or more than seven hundred fifty cigars upon which the taxes imposed by article twenty of this chapter have not been assumed or paid by the distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, or other person treated as a distributor pursuant to section four hundred seventy-one-d of this chapter shall be guilty of a misdemeanor punishable by a fine of not more than five thousand dollars or by a term of imprisonment not to exceed thirty days.

(3) Any person, other than a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, who shall knowingly transport or have in his custody, possession or under his control twenty-five hundred or more cigars or fifty or more pounds of tobacco upon which the taxes imposed by article twenty of this chapter have not been assumed or paid by a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, or other person treated as a distributor pursuant to section four hundred seventy-one-d of this chapter shall be guilty of a misdemeanor. Provided further, that any person who has twice been convicted under this subdivision shall be guilty of a class E felony for any

subsequent violation of this section, regardless of the amount of tobacco products involved in such violation.

(4) For purposes of this subdivision, such person shall knowingly transport or have in his custody, possession or under his control tobacco or cigars on which such taxes have not been assumed or paid by a distributor appointed by the commissioner of taxation and finance where such person has knowledge of the requirement of the tax on tobacco products and, where to his knowledge, such taxes have not been assumed or paid on such tobacco products by a distributor appointed by the commissioner of taxation and finance.

(k) Any person who falsely or fraudulently makes, alters or counterfeits a registration certificate or sticker required under the provisions of section four hundred eighty-a of this chapter, or causes or procures to be falsely or fraudulently made, altered or counterfeited any such registration certificate or sticker, or knowingly and willfully utters, purchases, passes or tenders as true any such false, altered or counterfeited registration certificate or sticker, and any person who knowingly and willfully makes, causes to be made, purchases or receives any device for forging or counterfeiting any registration certificate or sticker required under the provisions of such section, or who knowingly and willfully possesses any such device, shall be guilty of a class B misdemeanor.

New York Tax Law:

§1846. Seizure and forfeiture of cigarettes

(a) Whenever a police officer designated in section 1.20 of the criminal procedure law or a peace officer designated in subdivision four of section 2.10 of such law, acting pursuant to his special duties, shall discover any cigarettes subject to tax provided by article twenty of this chapter, and upon which the tax has not been paid or the stamps not affixed as required by such article, they are hereby authorized and empowered forthwith to seize and take possession of such cigarettes, together with any vending machine or receptacle in which they are held for sale. Such cigarettes, vending machine or receptacle seized by a police officer or such peace officer shall be turned over to the tax commission. Such seized cigarettes, vending machine or receptacle, not including money contained in such vending machine or receptacle, shall be forfeited to the state. The tax commission may, within a reasonable time thereafter, upon publication of a notice to such effect for at least five successive days, before the day of sale, in a newspaper published or circulated in the county where the seizure was made, sell such forfeited cigarettes and vending machines or receptacles at public sale and pay the proceeds into the state treasury to the credit of the general fund. Cigarettes so seized and sold shall be sold only to an agent under article twenty of this chapter and the notice of sale shall contain a provision to this effect. Notwithstanding any other provision of this section, the tax commission may enter into an agreement with any city of this state which is authorized to impose a tax similar to that imposed by article twenty of this chapter to provide for the disposition between the state and any such city of the proceeds from any such sale.

* * *

§1847. Seizure and forfeiture of vehicles or other means of transportation used to transport or for deposit or concealment of cigarettes

(a) Any peace officer designated in subdivision four of section 2.10 of the criminal procedure law, acting pursuant to his special duties, or any police officer designated in section 1.20 of the criminal procedure law may seize any vehicle or other means of transportation used to transport or for the deposit or concealment of more than one hundred unstamped or unlawfully stamped packages of cigarettes subject to tax under article twenty of this chapter, other than a vehicle or other means of transportation used by any person as a common carrier in transaction of business as such common carrier and such vehicle or other means of transportation shall be subject to forfeiture as hereinafter in this section provided.

* * *

20 NYCRR:

335.6 Indian nations or tribes, qualified Indian consumers and registered dealers. [Tax Law §§ 471, 471-a and 475](a) As provided for in this section and section 335.7 of this Part, exempt Indian nations or tribes, qualified Indian consumers and registered dealers (as defined herein) may purchase, on qualified reservations, cigarettes upon which the seller has not prepaid and precollected the cigarette tax imposed pursuant to article 20 of the Tax Law.

(b) (1) (i) *Qualified Indian* for purposes of this section means a person, duly enrolled on the tribal rolls of one of the exempt Indian nations or tribes.

(ii) *Qualified Indian consumer* for purposes of this section means a qualified Indian who purchases or intends to purchase cigarettes within the boundaries of a qualified reservation for such Indian's own use or consumption (i.e. other than for resale) within such reservation.

(2) *Exempt Indian nation or tribe* for purposes of this section means one of the following New York State Indian nations or tribes: Cayuga, Oneida Indian Nation, Onondaga Nation of Indians, Poospatuck, St. Regis Mohawk, Seneca Nation of Indians, Shinnecock, Tonawanda Band of Senecas and Tuscarora Nation of Indians.

(3) *Qualified reservation* for purposes of this section means the following reservations of the exempt Indian nations or tribes: Allegany Indian reservation, Cattaraugus Indian reservation, Oil Spring Indian reservation, Oneida Indian territory, Onondaga Indian reservation, Poospatuck Indian reservation, St. Regis Indian reservation, Shinnecock Indian reservation, Tonawanda Indian reservation and Tuscarora Indian reservation.

(4) *Registered dealer* for purposes of this section means:

(i) an Indian or non-Indian retail dealer (including but not limited to a dealer who has either a valid Indian Trader's License issued by the United States Department of the Interior, Bureau of Indian Affairs, or a valid license issued by an exempt Indian nation or tribe), who:

(a) registers with the Department of Taxation and Finance; and

(b) makes or intends to make qualified sales of cigarettes on a qualified reservation; or

(ii) a qualified Indian who is a wholesale dealer (including, but not limited to, a dealer who has either a valid Indian Trader's License issued by the United States Department of the Interior, Bureau of Indian Affairs, or a valid license issued by an exempt Indian nation or tribe), who:

(a) registers with the Department of Taxation and Finance; and

(b) makes or intends to make qualified sales of cigarettes on qualified reservations.

(5) *Qualified sale* for purposes of this section means a sale of cigarettes made on a qualified reservation by an agent, an exempt Indian nation or tribe, or a registered dealer, without prepayment and precollection of the cigarette tax to an exempt Indian nation or tribe, a registered dealer, or a qualified consumer.

(c) Although stamps are usually affixed to packages of cigarettes as evidence of payment of tax, the Commissioner of Taxation and Finance may authorize the use of a special stamp in order to clearly identify packages of cigarettes which are intended for nontaxable sales to qualified Indians on qualified reservations. If such special stamps are so authorized, the special stamps constitute documentary evidence of non-payment of the tax and, if possessed by a

registered dealer or an Indian for resale outside the boundaries of a qualified reservation, or by a non-Indian or a non-qualified Indian, such specially stamped packages of cigarettes are deemed to be unstamped packages of cigarettes. Cigarettes, upon which the tax has not been prepaid and precollected, and which bear such special stamps may not be sold to non-Indians or non-qualified Indians under any circumstances. In addition, any such specially stamped packages of cigarettes may not be sold outside the boundaries of a qualified reservation, unless such sale is specifically authorized by this Part.

(d) *Exempt Indian nations or tribes.* (1) An exempt Indian nation or tribe may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax for its own use or consumption, or for making qualified sales, provided that the nation or tribe:

(i) holds a valid exempt organization certificate issued by the New York State Department of Taxation and Finance;

(ii) takes delivery of the cigarettes on its qualified reservation; and

(iii) uses, or intends to use, such cigarettes for its own official use or consumption within such reservation, or to make qualified sales.

(2) An exempt Indian nation or tribe may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax by issuing to the seller a properly completed certificate of exemption for qualified Indian nations or tribes. Such exemption certificate must disclose the In-

dian nation's or tribe's exempt organization number referred to in section 529.9(b) of this Title.

(3) Failure to comply with any of the provisions of article 20 of the Tax Law, or any rule or regulation pursuant to such article, may result in the cancellation or suspension of the authority of such nation or tribe to purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax for purposes of making qualified sales.

(e) *Qualified Indian consumers.* (1) a qualified Indian consumer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax, if such individual:

(i) takes delivery of the cigarettes on a qualified reservation; and

(ii) purchases the cigarettes for such individual's own use or consumption within such reservation.

(2) A qualified Indian consumer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax, by issuing to the seller of the cigarettes a properly completed certificate of individual Indian exemption for certain taxes on property delivered on a reservation.

(f) *Registered dealers.* (1) Upon application, the Department of Taxation and Finance may register an applicant and issue a certificate of registration as a dealer of cigarettes to such applicant, if the applicant:

(i) (*a*) is an Indian or non-Indian retail dealer who or which makes, or intends to make, qualified sales within the boundaries of a qualified reservation; or

(*b*) is a qualified Indian, who is also a wholesale dealer, who makes, or intends to make, qualified sales within the boundaries of a qualified reservation;

(ii) (*a*) has no outstanding liability for any taxes or other amounts imposed pursuant to the Tax Law which has finally been determined to be due from such applicant; and

(*b*) is properly licensed or registered for any applicable taxes (e.g. that the applicant has a valid certificate of authority for the sales tax pursuant to Tax Law section 1132(c)); and

(iii) (*a*) provides evidence to the department that such applicant has complied (or will comply) with any applicable tribal regulations and/or licensing procedures; and

(*b*) has no outstanding liability for any applicable taxes or other sums which may be imposed by an Indian nation or tribe, and which has finally been determined to be due from such applicant.

(2) Unless so registered, or otherwise specifically provided for in this Part, no person shall sell cigarettes within a qualified reservation without prepayment and precollection of the cigarette tax. No fee is charged for this registration.

(3) A registered dealer may purchase cigarettes upon which the seller has no prepaid and precollected the ciga-

rette tax for purposes of making qualified sales, provided that the registered dealer:

(i) has received from the department a valid certificate of registration as a dealer of cigarettes;

(ii) takes delivery of such cigarettes within the boundaries of its qualified reservation; and

(iii) uses or intends to use such cigarettes to make qualified sales.

(4) A registered dealer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax by issuing to the seller of such cigarettes a properly completed certificate of exemption. Such exemption certificate must indicate such dealer's registration number.

(5) Failure to comply with any of the provisions of article 20 of the Tax Law, or any rule or regulation pursuant to such article, may result in the cancellation or suspension of the registration as a dealer of cigarettes.

(g) (1) The exemption certificates prescribed in subdivision (d), (e) and (f) of this section must be completed by the purchaser and given to the seller of cigarettes upon which the tax has not been prepaid and precollected, at the time of an initial purchase. A separate exemption certificate need not be given for each additional purchase of cigarettes, provided that each delivery of such cigarettes is substantiated as being exempt from tax with an individual bill, invoice, receipt or other form of written evidence given by

the seller showing the exempt Indian nation or tribe, qualified Indian consumer, or registered dealer as the purchaser.

(2) Every bill, invoice, receipt or other form of written evidence given by the seller must indicate the quantity of cigarettes delivered, the purchase price of the cigarettes without regard to any exemption and the price paid or to be paid by the exempt purchaser for such cigarettes. In addition, such evidence of each exempt transaction must be retained by the seller and must be signed and dated by the individual taking delivery of the cigarettes. In the case of a purchase by an exempt Indian nation or tribe, such evidence must also indicate such nation's or tribe's exempt organization number. In the case of a purchase by a registered dealer, such evidence must also indicate the dealer's registration number.

(3) Sellers of cigarettes upon which the tax has not been prepaid and precollected must establish an acceptable system of associating copies of these individual bills, invoices, receipts and other forms of written evidence of exemption from tax with the applicable tax exemption certificates initially received from the purchasers.

(4) A licensed cigarette agent must report all sales of cigarettes to exempt Indian nations or tribes, qualified Indian consumers and registered dealers in its monthly cigarette tax return.

Historical Note
Sec. filed Oct. 17, 1989 eff. Nov. 7, 1989.

335.7 Qualified sales of cigarettes on qualified reservations. [Tax Law, §§471, 471-a, 475 and 481(2)]

(a) (1) The cigarette tax imposed pursuant to article 20 of the Tax Law is not required to be prepaid and precollected when cigarettes are sold under circumstances which preclude the imposition of the tax by reason of the United States Constitution and any laws of the United States enacted pursuant thereto.

(2) Federal constitutional and statutory principles relating to Indian sovereignty, preempt the application of a state cigarette excise tax to a sale of cigarettes on a qualified reservation, if such cigarettes are ultimately purchased on such reservation by a qualified Indian for such Indian's own personal use or consumption. Consistent with such federal principles, sales of cigarettes on a qualified reservation to a non-Indian and non-qualified Indian are subject to the tax since the ultimate incidence of, and liability for, the tax is upon the non-Indian or non-qualified consumer. Additionally, consistent with such principles, all sales of cigarettes made within a state and outside the boundaries of a qualified reservation, regardless of whether the seller and/or the purchaser is an exempt Indian nation or tribe, a registered dealer, or a qualified Indian consumer, are subject to a state's cigarette excise tax.

(b) (1) An agent licensed by the Department of Taxation and Finance to purchase and affix stamps may possess cigarettes upon which the tax has not been prepaid and

precollected for purposes of making qualified sales, if that agent—with the prior approval of the Department of Taxation and Finance, or, if applicable, of an exempt Indian nation or tribe—sells and delivers such cigarettes to:

(i) an exempt Indian nation or tribe;

(ii) a registered dealer; or

(iii) a qualified Indian consumer.

(2) No person other than a duly licensed cigarette agent (and its employees) may possess cigarettes for sale in this State and transport such cigarettes onto a qualified reservation located in this State without prepaying and precollecting the cigarette tax. However, as provided in section 335.6 of this Part, subsequent qualified sales may be made solely on such qualified reservations. Properly completed exemption certificates must be received by all sellers of cigarettes, where the tax has not been prepaid and precollected.

(3) In order to administer the cigarette tax with respect to the sale of cigarettes on qualified reservations consistent with federal constitutional and statutory principles, a cigarette agent may sell and deliver cigarettes without prepayment and precollection of the cigarette tax to exempt Indian nation or tribe, a qualified Indian consumer, or a registered dealer; provided that such agent complies with the applicable provisions of subdivisions (c) and (d) of this section with respect to approval of the amount of such cigarettes to be sold and delivered, and further complies with all of the requirements of this Subchapter.

(c) (1) If an exempt Indian nation or tribe agrees with the Department to regulate, license, or control the sale and distribution within its qualified reservation of an agreed upon amount of cigarettes upon which the seller has permissibly not prepaid and precollected the cigarette tax, then an agent must obtain the approval for delivery from that nation or tribe regarding the agreed upon amount of cigarettes to be sold and delivered without prepayment and precollection of such tax, prior to each such sale and delivery of any such cigarettes on such reservation.

(2) In the absence of such an agreement regarding the sale and distribution of cigarettes upon which the tax has not been prepaid and precollected, the agent must obtain the approval for delivery from the department regarding the amount of cigarettes to be sold and delivered without prepayment and precollection of such tax, prior to each such sale and delivery of any such cigarettes on such reservation.

(d) (1) If applicable, departmental approval for delivery will be based upon evidence of valid purchase orders received by the agent of quantities of cigarettes reasonably related to the probable demand of qualified Indian consumers in the trade territory of the exempt Indian nation or tribe (if such nation or tribe chooses to make qualified sales), or registered dealer.

(2) In determining such probable demand, the department will:

(i) in the event that an exempt Indian nation or tribe regulates, licenses or controls the sale and distribution of cigarettes within its reservation, consult with such nation or tribe regarding any evidence it may submit relating to such probable demand (e.g. records of previous sales to qualified

Indian consumers, records relating to the average consumption of qualified Indian consumers on and near its reservation, tribal enrollment, or other statistical evidence, etc.); or

(ii) in the absence of such regulation or such evidence, calculate such demand based upon the New York average consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the number of enrolled members of the affected nation or tribe (or, if such membership numbers are unavailable, by the reservation service area population, as compiled by the Federal Bureau of Indian Affairs).

(3) In determining such trade territory, the department will:

(i) in the event that an exempt Indian nation or tribe regulates, licenses or controls the sale and distribution of cigarettes within its reservation, consult with such nation or tribe regarding any evidence it may submit relating to such regulated and/or licensed sellers located on its reservation; or

(ii) in the absence of such regulation or such evidence, calculate such trade territory based upon the information at its disposal.

(4) In addition, the department will also take into consideration any evidence submitted by a registered dealer relating to such probable demand and to that dealer's trade territory (e.g. a verified record of previous sales to qualified Indian consumers, evidence of the number of qualified Indian consumers located within a reasonable distance of the dealer's place of business, records indicating the percentage

of such trade historically realized by the dealer, or other statistical evidence in support of the proposed transaction).

(5) In the absence of any such evidence by an exempt Indian nation or tribe or a registered dealer, the department may restrict the total deliveries to any reservation of cigarettes, upon which the tax has not been prepaid and precollected, to an amount calculated pursuant to subparagraphs (2)(ii) and (3)(ii) of this subdivision.

(6) Approval for sale or delivery to an exempt nation or tribe or to a registered dealer will be denied where the department finds that such nation or tribe, or dealer are or have been making sales in violation of this Subchapter.

(e) Exempt Indian nations or tribes, qualified Indian consumers, and registered dealers may purchase cigarettes upon which the seller has not prepaid and precollected the tax, only to the extent provided in this section and in section 335.6 of this Part. The possession within this State at any one time of more than 400 cigarettes in unstamped (or unlawfully stamped) packages by any Indian nation or tribe, qualified Indian consumer or registered dealer, except as provided herein, shall be presumptive evidence that such cigarettes are subject to tax. Such Indian nations or tribes, consumers, and dealers, who or which purchase cigarettes under any other circumstances must prepay or pay, as the case may be, the cigarette tax at the time of purchase by remitting the tax to the seller as part of the purchase price of the cigarettes.

Historical Note

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